

The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part I

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*I am not the water—
I am the wave,
and the rage
is the force that moves me.*

...

*In birthing my rage,
my rage has rebirthed me.*

—Susan Stryker¹

I. INTRODUCTION

As we await word from the U.S. Supreme Court on whether Title VII of the 1964 Civil Rights Act protects lesbian, gay, and trans workers when they suffer sex discrimination at work and legally complain, it's worth essaying some of the more striking features of the LGBT Title VII cases as they were litigated before the Supreme Court.²

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¹ Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, in THE TRANSGENDER STUDIES READER 244, 252 (Susan Stryker & Stephen Whittle eds., 2006).

² See generally 42 U.S.C. § 2000e-2 (2012); *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 F. App'x 964 (11th Cir. 2018) (per curiam), *cert. granted*, 139 S. Ct. 1599 (2019).

The present interest in these developments involves neither a wish nor an expectation to influence the judicial process. That would likely be pointless anyway. The outcome of the LGBT Title VII sex discrimination cases is assuredly set in basic form by now. Instead, the interest here corresponds to a desire to record how anti-LGBT forces have conducted themselves at a moment when they apparently think they have a newly receptive audience in the form of a jurisprudentially and socially conservative majority of the Supreme Court.³ This conduct and the probabilities it involves ought to be of immediate concern to liberals and progressives committed to sexuality, trans, sex, and other intersecting inequalities, quite aside from the legal effects that these attempts may yield in the present cases. If the near-term and longer-term futures for LGBT and sex discrimination rights and interests are uncertain, the litigation strategies developed and deployed against LGBT positions in the Title VII cases are not. They revealed anti-LGBT forces boldly articulating arguments that draw on and play to not only rule of law conventions like logic and reason, but also to elements in the U.S. cultural archive that reanimate fantasy nightmares of LGBT rights as portents of hellish gender and sexual deviance run amok, deviance that—on its surface anyway—is racially marked as white.⁴ It has been more than a generation since fantasies like these commanded a majority of the Supreme Court in a case involving lesbian and gay rights, but that possibility—a possibility in which time flows forward to the past—currently stares the American public in the face.⁵

(mem.); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted in part*, 139 S. Ct. 1599 (2019) (mem.); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.). Partly given who the plaintiffs were and are and how they identified themselves, many others from the LGBT communities were not centrally featured in the litigation. Without being exhaustive, these include those who identify as bisexual, pansexual, nonbinary, genderfluid and genderqueer. Although the “LGBT” locution in the text is thus imprecise, it is used in this setting as a serviceable way to mark the identity-based nature of the claims that the cases did place center stage and how they intersected with legal authority, both specific to Title VII’s sex discrimination ban and of the Supreme Court, more broadly. Nothing big or theoretical is meant to hang on it.

³ Other efforts that move incisively in these directions include Ezra Ishmael Young, *What the Supreme Court Could Have Heard in R.G. & G.R. Harris Funeral Homes v. EEOC & Aimee Stephens*, 11 CALIF. L. REV. ONLINE 9, 13–14 (2020); Chase Strangio, *These Hate Groups Want the Supreme Court to Erase Trans People*, OUT (Aug. 28, 2019), <https://www.out.com/commentary/2019/8/28/these-hate-groups-want-supreme-court-erase-trans-people> [<https://perma.cc/37TB-P55G>]. See also Masha Gessen, *The Supreme Court Considers L.G.B.T. Rights, but Can’t Stop Talking About Bathrooms*, NEW YORKER (Oct. 9, 2019), <https://www.newyorker.com/news/our-columnists/the-supreme-court-considers-lgbt-rights-but-cant-stop-talking-about-bathrooms> [<https://perma.cc/63PD-BW6W>].

⁴ More on the raciality of the cases after the decisions come down.

⁵ For how they came up in *Bowers v. Hardwick*, 478 U.S. 186 (1986), see generally Kendall Thomas, Commentary, *The Eclipse of Reason: A Rhetorical Reading of Bowers v.*

All these dynamics—and all these actors—have become part of the context against which the LGBT Title VII sex discrimination cases will be decided. Whatever the Supreme Court’s results, the cases will be the next step in an ongoing jurisprudence of lesbian and gay rights that may continue in pro-LGBT, including expressly pro-trans, directions—or that may shift course having elsewhere exhibited signs of a legal slowdown since *Obergefell v. Hodges*, the landmark right-to-marry decision.⁶

If, on the distant horizon, representations of the closet can be glimpsed starting to take shape, they have in certain respects arrived herald-like in the LGBT Title VII sex discrimination litigation. Happily, the prospects that the legal system will once again reopen, repopulate, and repolice the closet in something resembling its historical forms is broadly inconceivable, but it is still time, as the Supreme Court’s next Term takes shape, for pro-LGBT forces to consider reconvening as broad-based and engaged political publics, ready to challenge the closet’s distantly reemergent strictures and the forms of inequality they intersectionally involve.⁷

These new cases demonstrate that the closet’s relegation to historical artifact is not to be taken for granted or assumed to be legally guaranteed by the U.S. Supreme Court. Especially not when the Supreme Court, as in these cases, silently witnessed and tolerated deceptively genteel, professional arguments that traded in cultural fantasies in which trans and gay people are variously being symbolized as social forces bent on the ruin of innocent cis-heterosexuals, both women and men, as well as the destruction of sex itself, all of which thus need the law, including measures like Title VII’s sex discrimination ban, to protect them.⁸ Should the Supreme Court even subtly endorse these cultural fantasies

Hardwick, 79 VA. L. REV. 1805 (1993). The qualification in the text is owing to how fantasies like these operated in certain ways in the dissenting opinions in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), as discussed in Marc Spindelman, *Obergefell’s Dreams*, 77 OHIO ST. L.J. 1039 (2016). Along a certain sightline, the *Obergefell* dissents prefigure aspects of the LGBT Title VII litigation that will be discussed in detail in later Parts of this work.

⁶ See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). For signs of slow-down, see *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1732 (2018).

⁷ On what’s coming next Term, see generally *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019) (dealing with whether or not a foster care agency can refuse to work with same-sex couples), *cert. granted*, 140 S. Ct. 1104 (2020) (mem.). For a few of the many engaged sources that speak to the intersectionality point, see generally ANDREA RICHIE ET AL., *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* (2011); DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS AND THE LIMITS OF LAW* (1st ed. 2011); Gabriel Arkles et al., *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. SOC. JUST. 579 (2010); Russell K. Robinson, *Justice Kennedy’s White Nationalism*, 53 U.C. DAVIS L. REV. 1027 (2019).

⁸ *Masterpiece Cakeshop*, 138 S. Ct. at 1729–31 (discussing the constitutional implications of silence in the face of what the Supreme Court regarded as unconstitutional

when ruling in the LGBT Title VII sex discrimination cases, it could indicate a wider, future path of destruction of the legal gains that lesbians and gay men have achieved under law to this point, imperiling the conditions of legal and social life for others, inside the LGBT communities, including for trans people, as well as outside of them, where the cases interface with wider protections against sex discrimination on the traditional terrain of cis-women's equal rights.⁹ For now what there is to attend to is what happened at the Supreme Court, and what can be discerned about how these developments may construct various possible futures.

The overarching argument of this work, which will unfold across its serialized pieces, is as follows. Part II substantively begins by spotlighting the connections between the different Title VII sex discrimination cases before the Supreme Court. In addition to introducing some of the case basics, discussion here involves an account of the distinctive significance of the trans sex discrimination case. It identifies a key set of defense arguments organized around not simply bathrooms, but, specifically, ladies' showers and locker rooms, which served as a normative touchstone for the defense's case against trans sex discrimination rights under Title VII.

Next, Part III takes a closer look at the defense's renderings of the "shower and locker room" scene in the trans sex discrimination case. In detail, it traces the teachings of the defense's portrayals of ladies' showers and locker rooms which figure trans women as an invading force in order to critically expose the unmistakable and deeply transphobic and sexist suggestion that trans women, or some of them, pose an embodied, sexualized threat to cis-heterosexual women that if not criminal is crime-like. It also shows the multiple layers of transphobia and sexism working within this argument—including against cis-women and their interests.

Part IV then turns away from oral arguments to explore a policy claim advanced by the defense in briefing submitted to the Supreme Court that subtly but palpably involves a bid to re-psychologize and even re-pathologize trans identities and trans people. Problematic on its own, this bid shows what some who oppose trans rights in the case thought and hoped the Supreme Court might tolerate and possibly credit as valid, rational, non-animus-based legal reasoning that could properly drive an anti-trans outcome in the case, along with the public reasons given for it.

religious discrimination). For analysis of the case, see generally Lawrence G. Sager & Nelson Tebbe, *The Reality Principle*, 34 CONST. COMMENT. 171 (2019); Marc Spindelman, Masterpiece Cakeshop's *Homiletics*, 68 CLEV. ST. L. REV. 347 (2020). A number of additional sources treating the decision are collected in *id.* at 349 n.2.

⁹ The term "cis-women" here is not meant to imply that the women who may identify or be identified in these terms have any singular relationship to the category "woman" and its social meanings. Many cis-women do, or, on reflection, may find "woman" to be what has been described as a "struggle position." The presumed agreement and comfort with gender roles that "cis" can imply is far from universally real or true, to say the least.

For its part, Part V delivers an account of the shower scene's genealogy. It examines the appearance of the shower scene in the sexuality-as-sex-discrimination cases and surfaces thinking about its antecedents in ways that recover some of the shower's enduring cultural logics as well as its nonobvious stakes.

Having recovered these resonances, Part VI proceeds to leverage them to survey different ways that anxieties, sometimes panics, about gender and sexuality confusion were expressed during oral arguments in both the sexuality and the trans identity cases from both bar and bench, concerns that relate to the perceived stakes of recognizing sexuality and trans sex discrimination rights and what those forms of legal recognition are thought capable of doing to the organization of social relations and social life centered around male-female sex difference and the various hierarchies built atop and otherwise related to it. Discussion across various parts of the work develops a picture of the LGBT Title VII sex discrimination cases in which they function together through the shower scene as a larger set piece in which pro-trans, pro-lesbian, and pro-gay sex equality claims are representable and represented as functionally fungible threats—queer threats—to existing gender and sexual orders. Part VI also concludes by engaging the stakes of these cultural myths, and the imperatives of addressing them head-on, while looking to the future of LGBT rights no matter how the Supreme Court rules in the cases.

Next time: Some preliminaries on the LGBT Title VII sex discrimination cases.

The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part II

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I. THE SHOWER TODAY: PRELIMINARIES¹

Whatever their outcomes, the LGBT Title VII sex discrimination cases have once again broken new legal ground. For the first time ever, the Supreme Court has directly taken up, both in the same Term and on the same day, multiple cases involving different aspects of the rights of LGBT-identified persons. Few seem to doubt that were Justice Anthony M. Kennedy still an Associate Justice on the Supreme Court, the LGBT Title VII sex discrimination cases would be decided in step with the pro-lesbian and pro-gay equality jurisprudence he authored for the Court, and thus featured as cases involving concrete expressions of the high principles of equality, dignity, autonomy, and respect that his earlier decisions both announced and vindicated. Justice Kennedy's departure from the Court leaves it a relatively more open question whether LGBT rights will be secured under Title VII sex discrimination law at all.

Three cases involving LGBT sex discrimination claims are pending before the Supreme Court. Two, consolidated, involve gay men—Donald Zarda, now deceased, and Gerald Lynn Bostock—who sued former employers for sexual orientation discrimination said to be prohibited by Title VII's sex discrimination

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¹ Part I of this work appears as Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part I*, 81 OHIO ST. L.J. ONLINE 81 (2020).

ban.² The third case involves the suit by a trans woman—Aimee Stephens, now also, sadly, deceased—against her former employer, R.G. & G.R. Harris Funeral Homes, Inc., asserting that she suffered anti-trans discrimination barred as sex discrimination under Title VII.³

These cases moved along two separate tracks at the Supreme Court. One involves whether sexuality-based discrimination is sex discrimination.⁴ The other is about whether trans-based discrimination is.⁵ On different sides of the cases and in different ways, the issue of Title VII's meaning for lesbian women, gay men, and trans people, while in some sense formally distinct, has been notably linked.⁶ This linkage surfaces in arguments about how to interpret Title VII as a statute and how to read relevant Title VII caselaw. But the cases are also importantly connected rhetorically and politically. As the cases, interlocked, proceeded down their ostensibly separate tracks, many pro-LGBT and anti-LGBT forces have been hoping the cases would, respectively, stand or fall together.

Vital as these interconnections are, they imply no symmetries of significance. The linkages between the cases are forged in a fashion that places a distinctively heavy premium on the trans Title VII sex discrimination case. While anti-trans discrimination has been recognized as sex discrimination under Title VII for many years now, in opinions from different federal appellate jurisdictions joined by both conservative and liberal judges, the trans sex-discrimination case before the

² *Bostock v. Clayton Cty.*, 139 S. Ct. 1599, 1599 (2019) (mem.) (consolidating the case with *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2018)); *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 F. App'x 964, 964 (11th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 100 (2d Cir. 2018) (en banc), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.).

³ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 566 (6th Cir. 2018), *cert. granted in part*, 139 S. Ct. 1599 (2019) (mem.). Among the tributes remembering Aimee Stephens, Dee Farmer's stands out. Press Release, Nat'l Ctr. for Lesbian Rights, Dee Farmer, the First Transgender Plaintiff in a Supreme Court Case, Mourns the Passing of Aimee Stephens (May 15, 2020), <http://www.nclrights.org/press-room/press-release/dee-farmer-the-first-transgender-plaintiff-in-a-supreme-court-case-mourns-the-passing-of-aimee-stephens/> [<https://perma.cc/2SFM-7466>] ("I am saddened by the passing of Aimee Stephens, my sister in faith and love. Yet my heart is filled with warmth knowing that her voice will continue to be heard through her case in the Supreme Court. May this fact comfort us all."); *see also* Aimee Ortiz, *Aimee Stephens, Plaintiff in Transgender Case, Dies at 59*, N.Y. TIMES (May 12, 2020), <https://www.nytimes.com/2020/05/12/us/aimee-stephens-supreme-court-dead.html> [<https://perma.cc/2NZ9-M9RK>].

⁴ *Altitude Express Inc. v. Zarda*, 139 S. Ct. 1599, 1599 (2019); *Bostock*, 139 S. Ct. at 1599.

⁵ *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599, 1599 (2019) (mem.).

⁶ In this respect, the "epistemic contract of bisexual erasure" persists. *See generally* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000). Practically, it may have widened. *See* Spindelman, *supra* note 1, at 81 n.1.

Supreme Court is poised to be the first such case the Supreme Court will decide in the era of its own pro-LGBT rights jurisprudence.⁷

Unfortunately, oral arguments in the case demonstrated it is slated to be settled by what might be described as a *TLIC*: a trans-low-information Court.⁸ This means the Supreme Court may be primed to think the trans sex-discrimination case, lacking secure grounding in a distinctively pro-trans Supreme Court jurisprudence, involves the larger jurisprudential leap for it to make compared to the gay sex-discrimination cases, despite both how easily the trans sex-discrimination claim is dispatched under established Title VII rules and how much more solidly grounded it is in lower court caselaw than the gay sex-discrimination claims and so easier to approve in that respect.⁹ The Supreme Court may deliver pro-trans and pro-gay decisions, but not without challenge, including reservations behind a majoritarian front announcing the results. Of course, the Court could keep the cases apart from one another, ruling on their issues differently, but this would generate questions of its own, including whether such a disposition would indicate the Supreme Court is in the business of picking winners and losers in a more or less openly political play to split the baby of the

⁷ For earlier cases involving trans rights at the Supreme Court, see generally *Gloucester Cty. Sch. Bd. v. G.G. ex rel Grimm*, 137 S. Ct. 1239 (2017) (vacating judgment and remanding case to the U.S. Court of Appeals for the Fourth Circuit for further consideration in light of then-new federal guidance from the U.S. Department of Education and the U.S. Department of Justice), and *Farmer v. Brennan*, 511 U.S. 825 (1994) (affirming prospects for a valid Eighth Amendment claim by a trans prisoner). A tally of federal appellate decisions recognizing anti-trans discrimination as sex discrimination is in Brief in Opposition for Respondent Aimee Stephens at 15–18, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Oct. 24, 2018) [hereinafter *Stephens's Brief in Opposition*].

⁸ Ezra Ishmael Young's work fills out the relevant point this way:

The biggest challenge by far is that many judges are unfamiliar with transgender people and harbor the same negative stereotypes that employers contesting coverage have—that transgender people are freakish, their asserted identities as women or men are delusional, gender transition amounts to no more than a change of a person's external appearance, and a transgender woman in particular is little more than a man in a dress. Left unchecked, negative attitudes about transgender people overly influence outcomes. The best way to overcome this is to teach courts about who transgender people actually are, tell their stories, and take every available opportunity to affirm the lived experience of the client and underscore her right to be treated with equal dignity and respect.

Ezra Ishmael Young, *What the Supreme Court Could Have Heard in R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens*, 11 CALIF. L. REV. ONLINE 9, 13–14 (2020) (footnotes omitted). For further discussion of this point, see also Alexander Chen, *The Supreme Court Doesn't Understand Transgender People*, SLATE (Oct. 18, 2019), <https://slate.com/news-and-politics/2019/10/supreme-court-transgender-discrimination-sex.html> [<https://perma.cc/L4VT-2W9R>].

⁹ This locution in the text is meant to recognize and account for *Farmer v. Brennan*, 511 U.S. 825 (1994).

cases by giving both pro-LGBT and anti-LGBT forces something to coo about. Nobody ever promised Supreme Court gamecraft would be easy.

The arguments in Stephens's trans sex discrimination case—captioned *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*—addressed the two certiorari questions the case involved. Is anti-trans discrimination sex discrimination under Title VII?¹⁰ And is anti-trans discrimination prohibited as a form of sex stereotyping under precedent tracing to *Price Waterhouse v. Hopkins*, holding sex stereotyping to be actionable sex discrimination in the case of a non-femme and somewhat butch, cis-heterosexual, and married woman?¹¹

Answering “no” to both questions, Harris Funeral Homes's legal defense hewed a conservative jurisprudential line on the statutory interpretation question, then easily leveraged to resolve the sex stereotyping knot.¹² Tracking similar arguments in the sexual orientation cases, the lawyer representing the funeral home at the Supreme Court, John J. Bursch of the Alliance Defending Freedom, took the position that, consistent with its “original public and legal meaning,” Title VII's ban on sex discrimination meant to “promot[e] women's equality” to men.¹³ This group-based understanding of the statute, read in light of certain traditions for thinking about “sex” in 1964, figured two and only two sex classes to which Title VII's sex discrimination ban could possibly refer: “women” and “men,” defined in terms of their natural or biological forms, or, as Bursch's client himself put it at one point, “an immutable God-given gift.”¹⁴

¹⁰ *Harris Funeral Homes*, 139 S. Ct. at 1599.

¹¹ *Id.*; see *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234–35 (1989) (“One partner described her as ‘macho’ . . . another suggested that she ‘overcompensated for being a woman’ . . . [and] a third advised her to take a ‘course at charm school.’”).

¹² Illuminating important aspects of the history of Title VII interpretation, Jessica A. Clarke, *How the First Forty Years of Circuit Precedent Got Title VII's Sex Discrimination Provision Wrong*, 98 TEX. L. REV. ONLINE 83 (2019), supplies a means by which to trace a genealogy of the defense claims now being made in the LGBT Title VII sex discrimination cases.

¹³ Transcript of Oral Argument at 30, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Oct. 8, 2019), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_4gcj.pdf [<https://perma.cc/8X32-Y5GT>] [hereinafter *Harris Funeral Homes Transcript*]; cf. also *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (venturing a test of “ordinary meaning . . . at the time that Congress enacted the statute”) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

¹⁴ On the argument about sex, see, for example, Petition for a Writ of Certiorari at 6, 6 n.1, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (July 20, 2018) [hereinafter *Harris Cert. Petition*] (defining that sex by stating “‘sex’ refers to a person's status as male or female as objectively determined by anatomical and physiological factors, particularly those involved in reproduction”) (citation omitted). See also, e.g., Brief for the Petitioner at 19, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 16, 2019) (“In common, ordinary usage in 1964, the word ‘sex’ meant biologically male or female, based on reproductive organs.”); *id.* at 23 (“Moreover, Congress and many members

Resisting pro-trans arguments by Stephens's lawyers, led by David D. Cole of the American Civil Liberties Union, Bursch insisted that "sex" under Title VII has always been and so must remain a trans-exclusive term.¹⁵ The implication of this argument, of course, was that all those lower court decisions interpreting Title VII's sex discrimination rule trans-inclusively were wrong and should be corrected. Without more, this effectively counts at naught *stare decisis* values

of this Court have recognized that sex in Title VII refers to the status of male or female as determined by reproductive biology." On the description of sex as "an immutable God-given gift," see *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 569 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599, 1599 (2019) (mem.) ("Rost avers that he 'sincerely believe[s] that the Bible teaches that a person's sex is an immutable God-given gift.'"). For an exchange framing Bursch's position as a group-based account of Title VII's sex discrimination rule and his reply, see Harris Funeral Homes Transcript, *supra* note 13, at 40–44. Thinking about "sex" in these ways is normatively readily associated with thinking about sex as sexual activity. See, e.g., Brief for Ryan T. Anderson as Amicus Curiae Supporting Employees at 9, *Altitude Express, Inc. v. Zarda*; *Bostock v. Clayton Cty.*; and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, Nos. 17-1623, 17-1618, 18-107 (Aug. 21, 2019) (mentioning "conjugal marriage" and noting that it "rests on no masculine or feminine stereotypes"). This point will become relevant as the argument in the work proceeds.

¹⁵ Harris Funeral Homes Transcript, *supra* note 13, at 29 ("Treating women and men equally does not mean employers have to treat men as women. That is because sex and transgender status are independent concepts."). Curiously unexplained by Bursch was how the original public meaning of the measure forever delimits what the Supreme Court must do as the agent of the political institution, the Congress, that had the constitutional authority to make this law. For some relevant commentary, see William N. Eskridge, Jr., *Symposium: Textualism's Moment of Truth*, SCOTUSBLOG (Sept. 4, 2019), <https://www.scotusblog.com/2019/09/symposium-textualisms-moment-of-truth/> [<https://perma.cc/T2KL-8KVM>]. There is a separate, but related question here of what the original public meaning of this measure was. How does it map onto the original introduction of the measure as an amendment to defeat Title VII? See Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 441–42 (1966). In the original public meaning, was the final inclusion of the term in the law also a joke? See Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 137–38 (1997) (discussing the "[c]onventional wisdom" that the work then goes on to give a "fresh look"). How does original public meaning map onto the deliberations of the measure that showed its pro-women's equality terms were also not unproblematically and at least partly about leaving white women behind in the march for civil rights, with the problematic racial politics that this involved? See generally Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713 (2015). Is that part of the original public meaning as well? For relevant context on the status of homosexuality in 1964 in Washington, D.C., see generally Lee Edelman, *Tearooms and Sympathy, or, the Epistemology of the Water Closet*, in THE LESBIAN AND GAY STUDIES READER 553 (Henry Abelove et al. eds., 1993) [hereinafter Edelman, *Tearooms and Sympathy*] (discussing events in 1964). Additionally, Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63 (2019), provides astute analysis of statutory originalism in the context of LGBT rights, importantly extended to the anti-trans-discrimination-is-sex-discrimination setting of Title VII by Young, *supra* note 8, at 25–27. On the scope of the idea of Title VII sex-discrimination being trans exclusive, see *infra* note 23 and accompanying text. Thanks to Ruth Colker for productive engagement on some of these points.

including the expectation and reliance interests of workers and management alike.¹⁶

Bursch placed his cards upon the table at the outset of his Supreme Court argument. As he did, he inaugurated a miserable procession of highly intentional misgenderings—getting trans people's pronouns wrong—that, despite their anti-trans negation and insult, the Bench silently tolerated without notable correction, presumably at least in part so as not to show any prejudice against his and his client's position.¹⁷

Bursch began: "Treating women and men equally [under Title VII] does not mean employers have to treat men as women."¹⁸ That was the first moment in the argument when Bursch misgendered Stephens as a "man" asking to be "treated" as a woman, denying her the dignity of being recognized and addressed on her own terms.¹⁹ Bursch continued: The reason why Title VII "does not mean

¹⁶ Harris Funeral Homes Transcript, *supra* note 13, at 29 ("[T]he Sixth Circuit imposed a new restriction, and its holding destroys all sex-specific policies."). For a pro-gay and pro-trans management position, see Brief of 206 Businesses as Amici Curiae in Support of the Employees at 1, *Bostock v. Clayton Cty.*; *Altitude Express, Inc. v. Zarda*; and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, Nos. 17-1618, 17-1623, 18-107 (July 3, 2019) (noting support for LGBT employees, including with specific reference to "sexual orientation and gender identity").

¹⁷ For some perspective on this sense of what's prejudicial and to whom, see Mark Joseph Stern, *Anti-LGBTQ Firm Tries to Disqualify Judge Because He Won't Let It Misgender Trans Kids*, SLATE (May 11, 2020), <https://slate.com/news-and-politics/2020/05/alliance-defending-freedom-student-athlete-misgender.html> [<https://perma.cc/3J2LQTM5>]. The Court's approach here was far from inevitable. Also, it was not without its harms. For support, consider Young, *supra* note 8, at 20–21 (detailing some of the harms of misgenderings). It may or may not obtain in the Supreme Court's ruling in the case. See, e.g., *id.* at 33–34 (discussing the affirmative use of Dee Farmer's female pronouns in oral arguments in *Farmer v. Brennan*, and how the Justices used "female or neutral referents throughout"). Judge Henry F. Floyd's opinion for the Fourth Circuit in *G.G. ex rel Grimm v. Gloucester County School Board*, 822 F.3d 709, 716 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017), casually, but aptly, describes intentional misgendering as anti-trans "hostility": "Many of the speakers [at a meeting of the Gloucester County School Board on a proposed "transgender restroom policy"] displayed hostility to G.G., including by referring pointedly to him as 'young lady.'" See also *id.* (describing how at another meeting on the policy, "[s]peakers again referred to G.G. as a 'girl' or 'young lady[:]' [o]ne speaker called G.G. a 'freak' and compared him to a person who thinks he is a 'dog' and wants to urinate on fire hydrants"). Plenty of slip-ups happened at the Supreme Court. An illustrative tally that doesn't promise exhaustiveness includes Harris Funeral Homes Transcript, *supra* note 13, at 5, 10–12, 19, 32, 37.

¹⁸ Harris Funeral Homes Transcript, *supra* note 13, at 29.

¹⁹ Bursch's legal defense of this is highly formalistic and has the feel of rationalization. Brief for the Petitioner at 8 n.3, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 16, 2019) ("Out of respect for Stephens and following this Court's lead in *Farmer v. Brennan*, 511 U.S. 825 (1994), Harris tries to avoid use of pronouns and sex-specific terms when referring to Stephens. When such terms must be used, Harris uses sex-based language consistent with Title VII's meaning."). Cf. Ruth Marcus, *We're at War Over Gender*

employers have to treat men as women” is “because sex and transgender status are independent concepts.”²⁰ “Sex” and “transgender status” being “independent concepts,” anti-trans discrimination is not sex discrimination outlawed by Title VII. *Q.E.D.* Not incidentally, a homologous claim was advanced by the defense in the sexuality cases, where the argument amounted to saying that Title VII’s sex discrimination ban does not outlaw anti-gay discrimination, because sex and sexual orientation are not the same thing.²¹

More aggressive than the conservative jurisprudential argument from “original public meaning” is an alternative line of thinking Bursch offered, grounded not in the soil of conservative jurisprudence so much as the related, wider terrain of social and/or cultural conservative political thought.²² Unbalancing an ostensible, if limited, concession allowing that trans people may in certain limited cases actually have a Title VII sex discrimination claim, the conservative and substantively anti-trans argument that Bursch developed, recommends the sweeping conclusion that there ought to be no pro-trans protections under Title VII.²³ Underwriting this position are logics that, taken seriously, indicate there should be no pro-trans legal protections under that law or any other. Looking immediately ahead, the ultimate reason Bursch offered for why this is so is bound up with what Justice Sonia Sotomayor described in the

Pronouns. Can’t We All Just Show Some Respect?, WASH. POST (Jan. 19, 2020), <https://www.washingtonpost.com/opinions/a-judge-said-calling-a-transgender-woman-her-would-show-bias-oh-please/2020/01/19/7d3a9f3c-3965-11ea-bb7b-265f4554af6d> [<https://perma.cc/6E2Z-MLJL>] (discussing the intentional misgendering in *United States v. Varner*, 948 F.3d 250 (5th Cir. 2020)).

²⁰ Harris Funeral Homes Transcript, *supra* note 13, at 29.

²¹ See Transcript of Oral Argument at 45, *Bostock v. Clayton Cty.*; Altitude Express, Inc. v. Zarda, Nos. 17-1618, 17-1623 (Oct. 8, 2019), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/17-1618_b97c.pdf [https://perma.cc/9T_ZZ_FHMR] [hereinafter *Bostock Transcript*] (“MR. HARRIS: . . . So . . . what I’m arguing is simply that sexual orientation standing alone is not, without more, sex discrimination.”); *id.* at 46–48 (Jeffrey M. Harris arguing that sex and sexual orientation categories are distinct).

²² For an important example in the tradition of social and/or cultural conservative political thinking about trans people and trans equality, see generally RYAN T. ANDERSON, *WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOVEMENT* (2018). For one reply, see KELLY R. NOVAK, *LET HARRY BECOME SALLY: RESPONDING TO THE ANTI-TRANSGENDER MOVEMENT* (2018).

²³ For an articulation of the concession, see Brief for the Petitioner at 15, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 16, 2019) (“Harris is *not* asking the Court to exclude transgender individuals from Title VII. They are protected from sex discrimination just the same as everyone else.”) (emphasis in original). *Accord* Harris Funeral Homes Transcript, *supra* note 13, at 20 (quoting David Cole describing the concession thus: “[T]he government and Petitioner concede that transgender people are not excluded from the statute. . . . They concede, transgender people can bring sex discrimination claims”).

arguments in Bostock and Zarda's Title VII cases as an issue that's been "raging the country": "bathroom usage[;] [s]ame-sex bathroom usage."²⁴

Briefly, before detailing Bursch's remarks, Bursch's focus on "[s]ame-sex bathroom usage" might have been thought a doubtful legal strategy. By its own "admi[ssion]," Harris Funeral Homes had allowed that "the restroom [issue] was a . . . hypothetical issue" that had nothing to do with "why [Aimee Stephens] was fired."²⁵ Bursch bypassed this as a factual constraint on his argument to make a deep and crucial play around what he himself referred to at one point as "the restroom scenario."²⁶ By the end of Bursch's oral argument, it was clear that the real focus of the "the restroom scenario" was less on restrooms than on the related, and more culturally charged, sex-segregated spaces of "shower[s] and . . . locker room[s]," specifically, showers and locker rooms for and inhabited by women,

²⁴ Bostock Transcript, *supra* note 21, at 12. Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, in *THE TRANSGENDER STUDIES READER* 244 (Susan Stryker & Stephen Wittles eds., 2006), supplies a vital trans perspective on this phenomenon.

²⁵ Harris Funeral Homes Transcript, *supra* note 13, at 13 (statement by David Cole). *Accord* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 566, 569 (6th Cir. 2018) ("Stephens was terminated from the Funeral Home by its owner and operator, Thomas Rost, shortly after Stephens informed Rost that she intended to transition from male to female and would represent herself and dress as a woman while at work. . . . Rost testified that he fired Stephens because 'he was no longer going to represent himself as a man. He wanted to dress as a woman.'"), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.). *But see* Brief for the Petitioner at 9 n.4, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Aug. 16, 2019) [hereinafter Harris Petitioner Brief] (discussing the relevance of "sex-specific restrooms" to the facts and the disposition of the case). For Bursch's position during oral argument at the Supreme Court, see *infra* text accompanying notes 26, 35–39. Much more on this "bathroom scenario" and how it plays out in the context of the LGBT Title VII sex-discrimination cases across various vectors is to follow in the text in this and subsequent Parts of the work.

²⁶ Harris Funeral Homes Transcript, *supra* note 13, at 45 (statement by John Bursch: "the restroom scenario"). For support for the idea of there being a case-based "factual constraint" on Bursch's argument, see *id.* at 11–13 (observations by David Cole to this effect). Briefing for Harris Funeral Homes took issue with the idea that the "the restroom scenario" was in fact hypothetical. Harris Petitioner Brief, *supra* note 25, at 9 n.4 (disputing the notion that "[r]estroom use was 'hypothetical'"). *But see* Stephens's Brief in Opposition, *supra* note 7, at 26–27 (arguing that "[s]ex-specific [r]estroom [p]olicies [a]re [n]ot at [i]ssue in this [c]ase").

understood in terms of Bursch's traditional definition of sex.²⁷ To speak of cis-women in this lexicon is redundant: They are the only type of women there are.²⁸

The specter of this "restroom scenario" first surfaced at the Supreme Court in paper filings in the case.²⁹ Mention of ladies' showers and locker rooms surfaced

²⁷ Harris Funeral Homes Transcript, *supra* note 13, at 45. Some of the reasons some may find this distinctive focus of the "restroom scenario" on women surprising are suggested by Lee Edelman's still remarkable work in Edelman, *Tearooms and Sympathy*, *supra* note 14. Cf. also generally Lee Edelman, *Men's Room*, in *STUD: ARCHITECTURES OF MASCULINITY* 152 (Joel Sanders ed., 1996). With thanks to Martha Chamallas for the insight, it is possible that, doctrinally, Bursch's focus on showers and locker rooms may have to do with how Title VII's bona fide occupational qualification (BFOQ) defense, enacted at 42 U.S.C. § 2000e-2(e)(1), might work in this setting, particularly as a privacy-based BFOQ, on which, see, for example, MARTHA CHAMALLAS, *PRINCIPLES OF EMPLOYMENT DISCRIMINATION LAW* 73–74 (Concise Hornbook Series, West Academic Publishing 2019) (discussing the BFOQ defense focusing on "concerns for protecting women against sexual assault or invasions of privacy[,] including *Teamsters Local Union v. Washington Department of Corrections*, 789 F.3d 979 (9th Cir. 2015), described as allowing sex-based eligibility criteria for certain prison guard positions in view of "many documented instances of sexual misconduct by male guards at those prisons" when the court "regarded the exclusionary policy as necessary to prevent sexual assaults of female inmates, many of whom had experienced prior sexual abuse before incarceration"). The prospects of lawful sex-specific job requirements, however, does not without more decide whether Title VII's definition of "sex" countenancing of "woman" should be trans inclusive or not. For more on the BFOQ defense as it arose at oral arguments, see *infra* notes 35 and 38. The account to be provided in subsequent Parts reconfigures this doctrinal point in other terms.

²⁸ In a stylized way, this may go some distance toward helping to explain the way Bursch's oral argument focused on the women's shower and locker room and not on the presence of trans men in the men's.

²⁹ This is not, however, the first time talk of showers and locker rooms has surfaced in the context of trans rights, though it is often occluded by—and within—talk of restrooms. For some direct invocations, see for example, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016) ("We agree that it has indeed been commonplace and widely accepted to separate public restrooms, locker rooms, and shower facilities on the basis of sex."), *vacated and remanded*, 137 S. Ct. 1239 (2017); ANDERSON, *supra* note 22, at 176 (discussing giving "boys unfettered access to girls' bathrooms, locker rooms, dorm rooms, hotel rooms, and shower facilities, if they claim to identify as girls"); *id.* at 182 (mentioning "DOJ . . . prison regulations" that include "the requirement that prison policies generally 'enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia'") (footnote omitted); *id.* (talking about sharing "a bedroom, shower, or locker room with a student of the opposite biological sex"); *id.* at 184 (quoting letter by fourteen-year-old-girl discussing "[t]he idea of permitting a person with male anatomy—regardless of whether he identifies as a girl—in girls' locker rooms, showers and changing areas, and restrooms makes me extremely uncomfortable and makes me feel unsafe as well"); *id.* at 184–85 (mentioning a Supreme Court amicus brief by Safe Spaces for Women discussing "women's showers, locker rooms, and bathrooms") (footnote omitted); *id.* at 200 (referring to "sex-specific bathrooms, locker rooms, showers, and sport teams"). One place that the language of showers and locker rooms finds a legal home is in 34 C.F.R. § 106.33 (2019) (providing for "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities

repeatedly in these papers—so frequently, in fact, that the regularized return to them at some point begins to give off the impression of an undue, perhaps even prurient, interest in these spaces and what takes place in them.³⁰

The official transcript of oral arguments shows Bursch talking about bathrooms, showers, and locker rooms even before he braves to mention the notion of “original public . . . meaning.”³¹ Retrospectively, this lexical priority, reinforced in a just-in-time final return to “the restroom scenario” as his oral argument ends, is a powerful indication that what properly functions here as a, or the, shower and locker room scene, is meant to serve, or in any event functions, as the make-or-break normative touchstone for his case.³²

provided for students of one sex shall be comparable to such facilities for students of the other sex”).

³⁰ See Harris Cert. Petition, *supra* note 14, at 2 (noting that “federal law in some parts of the country now mandates that employers, governments, and schools must administer dress codes and assign living facilities, locker rooms, and restrooms based on the ‘sex’ that a person professes”); *id.* at 14 (maintaining that the Sixth Circuit’s decision in the case “threatens to drive out sex-specific policies—ranging from living facilities and dress codes to locker rooms and restrooms—in employment and public education”); *id.* at 17 (discussing a Seventh Circuit decision that “told public schools that they must regulate access to sex-specific facilities like locker rooms and restrooms based on gender identity instead of sex”); *id.* at 20 (discussing “locker rooms[] and restrooms”); *id.* at 27 (noting concerns about “locker rooms[] and restrooms” discussed by the dissenting circuit judge in *Zarda*); *id.* at 30–31 (mentioning “locker rooms[] and restrooms”); *id.* at 32–33 (commenting that “[t]he specific implications of the Sixth Circuit’s ruling for sex-specific living facilities, locker rooms, and restrooms raise fundamental privacy concerns”); see also Brief for the Petitioner at 2, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Aug. 16, 2019) (mentioning “sex-specific changing and restroom facilities”); *id.* at 3 (observing that “Congress did not share that position [that “sex’ is itself a stereotype”], which would require eliminating sex-specific policies altogether, including sex-specific overnight facilities or showers”); *id.* at 4 (remarking that “redefining sex discrimination in Title VII will prohibit employers from maintaining sex-specific privacy in overnight facilities, showers, restrooms, and locker rooms”); *id.* at 12 (talking about an employer’s ability “to maintain a sex-specific dress code, shower[,] and locker-room policy”); *id.* at 13 (talking about “shower[ing] with female coworkers”); *id.* at 18 (discussing “sex-specific showers, restrooms, and locker rooms”); *id.* at 45 (citing *U.S. v. Virginia*, 518 U.S. 550 n.19 (1996)) (suggesting that “[r]edefining sex discrimination in Title VII would adversely affect employers. . . . [f]or example, it would prohibit organizations from maintaining sex-specific sleeping facilities, showers, restrooms, and locker rooms, all of which ‘afford members of each sex privacy from the other sex.’”); *id.* at 46 (discussing exemptions in New Mexico’s antidiscrimination law involving “sex specific ‘sleeping quarters,’ ‘showers,’ and ‘restrooms’”). This tally doesn’t include all the references to restrooms found in the relevant papers.

³¹ Harris Funeral Homes Transcript, *supra* note 13, at 30.

³² *Id.* at 45. Bursch returned to this argument after oral arguments in an op-ed published in *The Hill*. John Bursch, *Difficult Issues Involving Human Sexuality Require Dialogue, Not Scorn, Misinformation*, HILL (Oct. 15, 2019), <https://thehill.com/blogs/congress-blog/civil-rights/465844-difficult-issues-involving-human-sexuality-require-dialogue> [<https://perma.cc/2FLA-LQYA>] (“And as I explained to the Supreme Court, if the ACLU prevails, every sex-specific shower, restroom, locker room, overnight facility, dress

These are details from near the top of Bursch's oral argument. He's just finished making his categorical point that Title VII doesn't require employers to "treat men as women."³³ Now he's trying to inoculate the Supreme Court against Cole's seductions on the first certiorari question. Cole himself had just been arguing Stephens wouldn't have been fired "but for" the sex she was "assigned at birth," which makes her firing, an adverse employment decision, unlawful Title VII sex discrimination.³⁴

Against this argument, which took Bursch's conservative, sex-binaristic view of "sex" and turned it in pro-trans directions, Bursch maintains that the Supreme Court must reject Cole's position if it is to avoid some awful, terrible, absurd, unthinkable results. Concretely, the results of Cole's pro-trans arguments and their implications for cis-women as Bursch has them in mind are so unspeakably bad—and evidently so obvious—that he does not speak them in terms. His representation of those results on and for cis-women and their bodies remains purely gestural throughout. Cole's argument, Bursch says, would

mean that a women's overnight shelter must hire a man who identifies as a woman to serve as a counsellor to women who have been raped, trafficked, and abused and also share restroom, shower, and locker room facilities with them. That is because, but for the man's sex, he would be allowed to -- to hold that job and to use those facilities.³⁵

code, and sports team in the country will almost certainly have to go."). The stylistics of Bursch's argument further reinforce the operative point. Whereas the statutory originalist claims are, in their way lifeless (flat, affectless, bloodless, abstract institutional arguments about the sources of the authoritative meaning of Title VII's sex discrimination rule as a legislative enactment), the shower and locker room scenes are full of imaginary life in multiple dimensions involving fictive, naked human bodies dramatically pornotroped. *See* Hortense J. Spillers, *Mama's Baby, Papa's Maybe: An American Grammar Book*, 17 *DIACRITICS* 65, 67 (1987) (articulating the notion of "pornotroping" in the specific context of racialized captivity).

³³ Harris Funeral Homes Transcript, *supra* note 13, at 29.

³⁴ *See, e.g., id.* at 28. For a sharp, pro-trans critique of this approach as a centerpiece of the litigation strategy in Stephens's case, see generally Young, *supra* note 8. Cole repeatedly made clear this was an argument for litigation, the thought being that even on this type of conservative argument about the meaning of "sex" under Title VII, Stephens should prevail in her case. *See, e.g.,* Harris Funeral Homes Transcript, *supra* note 13, at 22 (making argument that "for purposes of this case" "accept[s] the narrowest . . . definition of sex . . . and arguing that you can't understand what Harris Homes did here without it treating her differently because of her sex assigned at birth").

³⁵ Harris Funeral Homes Transcript, *supra* note 13, at 29–30. An earlier and somewhat different version of this example is in Brief for the Petitioner at 52–53, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 16, 2019) ("[U]nder the Sixth Circuit's rewriting of Title VII, that same [overnight] shelter would similarly be forced to hire a male who identified as female for a position requiring the applicant to stay in a common sleeping area with the women, or to counsel women who have been traumatized by sexual abuse and

This is Bursch's first argument from the shower and locker room scene in substance and sum.³⁶ Having made it, he underscores its significance for the second certiorari question, on sex stereotyping.³⁷ After this, Bursch invokes the scene in different ways several more times, including after the midpoint of his argument, before he returns to it in order to redraw it in a fuller way as his time at the podium ends.³⁸

Like the first sketch, Bursch's final rendition of the shower and locker room scene is brief and gestural. Its account of the horrific thing that a pro-trans ruling will mean for cis-women is unstated as such here, too. The focus of Bursch's attack, however, has now subtly shifted. It has been both expanded and contracted. Expanded, it is taking on both the "but-for-sex" and sex stereotyping claims at once. Contracted, it is spotlighting with greater precision what the operative core of this "restroom scenario" is. At first, Bursch's remarks make it sound like he's

domestic violence.""). For some discussion at oral arguments about how this scenario might be avoided under Title VII's BFOQ rule, enacted at 42 U.S.C. § 2000e-2(e)(1), see Harris Funeral Homes Transcript, *supra* note 13, at 35–38.

³⁶ A noteworthy antecedent to this version of the argument is the amicus brief jointly filed by the Women's Liberation Front and the Family Policy Alliance in *Grimm*. Brief of Women's Liberation Front and Family Policy Alliance as Amici Curiae Supporting Petitioner at 1–2, Gloucester Cty. Sch. Bd. v. G.G. *ex rel* Grimm, 137 S. Ct. 1239 (2017) (No. 16-273) (discussing federal "'guidance' expanding the reach of the 'sex' means 'gender identity' doctrine from just restrooms to *all* previously sex-segregated facilities, including locker rooms, showers, and dormitories"); *id.* at 2 (arguing that "male faculty, administrators, other employees, *and any other men who walk onto the campus* of a Title IX institution do not have to notify anyone about anything; they can just show up in any women's restroom, locker room, shower, or dormitory whenever they want"); *id.* at 4 (describing the Family Policy Alliance's "interest in this case [a]s tied directly to its advocacy for policies that protect the privacy and safety of women and children in vulnerable spaces such as showers and locker rooms"); *id.* at 5 (contending that "women who believed that they would have the personal privacy of living only with other women will be surprised to discover that men will be their roommates and will be joining them in the showers"); *id.* at 7 (insisting on the argument holding "[t]hat *any* man can justify his presence in *any* women's restroom, locker room, or shower by saying, 'I identify as a woman'" and indicating that this prospect "will not escape the notice of those who already harass, assault, and rape tens of thousands of women every day"); *id.* at 29 (commenting parenthetically on "restrooms (or locker rooms, dormitories, or showers)"); *id.* at 32 (that a "DOE . . . Guidance" "extend[s] the 'sex' means 'gender identity' doctrine to showers, locker rooms, dormitories, and beyond").

³⁷ On this point, Bursch notes that it is "wrong to say [the] case isn't about showers and overnight facilities and sports[, because] [e]very single one of those is impacted if you're talking about a sex-specific policy." Harris Funeral Homes Transcript, *supra* note 13, at 30.

³⁸ For other appearances, both direct and subtle, see *id.* at 31–32 (observing "when a biological male is refused access to the women's restroom, the -- the male would say that was an injury"); *id.* at 36–38 (talking about BFOQ in response to Justice Sonia Sotomayor's question about "women in a shelter"); *id.* at 37 (remarking "[b]ut let's go back to the women's overnight shelter . . ."); *id.* at 38–39 (engaging the BFOQ point again); *id.* at 40 (saying, after the midpoint of his oral argument, "[b]ut if the employer applied a sex-specific dress code or sex-specific showers and restrooms, that would not be a statutory violation because of their biological differences"); *id.* at 44 (referring to "opposite sex facilities").

about to talk about bathrooms generally. They conclude the same way. This may lead those who don't pay close attention to think this is just the conventional anti-trans bathroom parlay that's being discussed. Carefully sandwiched in the middle, however, is a concern involving bathrooms euphemistically, but formally, not at all. Here's what Bursch says:

One other point on the restroom scenario. Gender identity is a broad concept. You could have a male employee who identifies as a woman but doesn't dress as a woman, looks like a man, showing up in the shower and the locker room, and, again, the employer wouldn't be able to do anything about that because under Mr. Cole's theory, but for the fact he was a man, he could be there. And it's stereotyping to say men cannot be in the women's bathroom.³⁹

What's to be made of this claim? How should it be read alongside Bursch's earlier depiction of the shower and locker room scene? What does it—intentionally or not—say about trans women? What does it—intentionally or not—say about cis-women? Does a critical understanding of these arguments reveal that Bursch's defense against claims of sex discrimination was itself bound up with, and engaged in, sex discrimination—against women, both trans and not?

³⁹ Harris Funeral Homes Transcript, *supra* note 13, at 45.

The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part III

MARC SPINDELMAN*

I. THE SHOWER TODAY: A CLOSER LOOK¹

In important respects, the bookended versions of the shower and locker room scene that John Bursch sketches for the Supreme Court give and receive meaning from one another.² Read together, Bursch's audience is supposed to know that "[g]ender identity," which is a "broad concept," includes not only men who "identif[y] as . . . wom[e]n" and who look and dress like women, but also "male employee[s]" who "identif[y] as . . . wom[e]n," but do not dress or look like them.³ It's these trans women, described by Bursch as not "dress[ing]

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² For description, see Spindelman, *The Shower's Return: Part II*, *supra* note 1, at 97–99.

³ Transcript of Oral Argument at 45, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Oct. 8, 2019), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_4gcj.pdf [<https://perma.cc/8X32-Y5GT>] [hereinafter Harris Funeral Homes Transcript].

as . . . wom[e]n, [but] look[ing] like . . . m[e]n,” who Bursch is going to be talking about.⁴

In context, Bursch's references to a trans woman looking like a man function in a way that enables a subtle allusion to the fact that Aimee Stephens was only “intend[ing] to have sex reassignment surgery” at the time she was fired.⁵ Bursch's audience cannot possibly miss or fail to understand the point. Stated directly, Bursch's sketches involve a trans woman who has not had “sex reassignment surgery” who is “showing up in the shower and the locker room” not “dress[ed] as a woman,” indeed, not dressed at all, but “look[ing] like a man.”⁶ “Looking like a man” in this setting carries double meaning. It's about being “male” in appearance or in “look,” as well as being capable of casting a “male” gaze. The leading meaning helps Bursch's normative audience, itself predominantly, if not exclusively, non-trans, not to mistake that this “man” Bursch is describing, “who identifies as a woman,” is still “a man” in an embodied sense—with a penis. From a pro-trans point of view, this kind of focus on the trans body is itself a sure sign that a very serious problem is afoot.

A larger narrative involving this “male employee who identifies as a woman” who shows up naked in the shower and locker room emerges from situational clues that Bursch's minimalist sketching provides. Starting with the “overnight shelter,” Bursch identifies a place where women who have just been “raped, trafficked and abused” seek sanctuary.⁷ The women arrive at the “overnight shelter” post-trauma, likely post-traumatically, with injuries presumably inflicted by men, but only to find themselves meeting a counselor described by Bursch as a “man who identifies as a woman” but who “doesn't

⁴ *Id.* This presentation of “the bathroom scenario” only involves these trans women using the ladies' shower and locker room. It does not engage the alternative prospect of them being forced to use the men's shower and locker room. For some related reflections focused on bathrooms, see TRANSGENDER LAW CTR., PEEING IN PEACE: A RESOURCE GUIDE FOR TRANSGENDER ACTIVISTS AND ALLIES 3 (2005), <http://transgenderlawcenter.org/wp-content/uploads/2012/05/94930982-PIP-Resource-Guide.pdf> [<https://perma.cc/MK35-LZSV>] (“Safe bathroom access is not a luxury or a special right. Without safe access to public bathrooms, transgender people are denied full participation in public life. . . . For many transgender people, finding a safe place to use the bathroom is a daily struggle. Even in cities or towns that are generally considered good places to be transgender, . . . many transgender people are harassed, beaten and questioned by authorities in both women's and men's rooms.”); *id.* at 4 (“Of course, some transgender people are able to use the bathroom of their own choosing pre- or post-transition with relative ease. . . . For other transgender people this is not the case for a variety of reasons. Some people do not ‘pass’ well. . . . Others do not necessarily identify as male or female and are harassed in both the men's and the women's bathroom.”).

⁵ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 568 (6th Cir. 2018), *cert. granted in part*, 139 S. Ct. 1599 (2019) (mem.) (citation omitted).

⁶ *Id.*; Harris Funeral Homes Transcript, *supra* note 3, at 45.

⁷ *Id.* at 29.

dress as a woman,” but “looks like a man.”⁸ Within this fictional story, crossing the shelter’s threshold means these women will be under this “man’s” authority. Under the circumstances, submission to “male” authority like this might be painful, even traumatizing, if these women are fleeing from abuses of socially male power that has injured them. Worse is in store: For this person Bursch represents as a “man” is about to abuse “his” authority and these women when “he” exercises the employment discrimination rights involved in the case, which, according to Bursch, would afford the counselor the legal right to share the facilities—bathroom, shower, and locker room—with these recently injured women.

If, in this narrative, it is unexceptionable that a trans counselor might wish to relieve herself during the workday, it is not at all apparent why she would want or ever need to be showering or in a locker room in a state of undress with her and the shelter’s clients. How this conduct, if it ever were to come to pass, would synch with relevant licensure rules governing interactions between overnight shelter counselors, when duly professionally licensed, and shelter clients is not, of course, discussed.⁹ Nor did any Justice inquire about it. In this story what is important—and what is mentioned—is only that this counselor is

⁸ *Id.* at 29, 45. For perspective on who perpetrates their injuries, see Brief for Military Spouses United as Amici Curiae Supporting Petitioner at 4, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC (Aug. 23, 2019) (No. 18-107) (citing *The Downtown Soup Kitchen D/b/a Downtown Hope Ctr. v. Municipality of Anchorage*, Anchorage Equal Rights Comm’n, No. 3:18-CV-00190-SLG, 2019 WL 3769623, at *1 (D. Alaska Aug. 9, 2019) (noting that “[m]ost of the women at the Hope Center shelters have escaped from sex trafficking or been abused or battered, primarily at the hands of men”)). Although Bursch’s depiction involves a trans counselor at the “overnight shelter,” nothing he tells the Supreme Court flags the rates of anti-trans violence and injury, particularly how regularly trans people are victims and survivors of rape, trafficking, and abuse. Indications are found in SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUALITY, *THE REPORT OF THE 2015 TRANSGENDER SURVEY* 14–17, 133–34, 153–55, 176, 186, 191–93, 197–209 (Dec. 2016), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF> [<https://perma.cc/3888-SQGT>] [hereinafter 2015 TRANSGENDER SURVEY REPORT] (tracking various aspects of sex-based injuries); Anne E. Fehrenbacher, *Transgender People and Human Trafficking: Intersectional Exclusion of Transgender Migrants and People of Color from Anti-Trafficking Protection in the United States*, 6 J. HUM. TRAFFICKING 182, 186–91 (2020) (discussing trans people and human trafficking); and Sarah M. Peitzmeier et al., *Development of a Novel Tool to Assess Intimate Partner Violence Against Transgender Individuals*, 34 J. INTERPERSONAL VIOLENCE 2376, 2387 (2019) (noting statistics showing comparative rates of intimate partner violence). See also *Responding to Transgender Victims of Sexual Assault*, OFF. FOR VICTIMS CRIME, https://www.ovc.gov/pubs/forgel/sexual_numbers.html [<https://perma.cc/L9NN-HTTP>].

⁹ For preliminaries on pro-LGBT, including pro-trans, practices for domestic violence programs, see generally THE NETWORK/LA RED, *OPEN MINDS OPEN DOORS: TRANSFORMING DOMESTIC VIOLENCE PROGRAMS TO INCLUDE LGBTQ SURVIVORS* (2011), <https://safehousingpartnerships.org/sites/default/files/201701/Open%20Minds%20Open%20Doors%202013.pdf> [<https://perma.cc/TQB6-M2D6>] [hereinafter, THE NETWORK/LA RED, OPEN MINDS OPEN DOORS]. Thanks to Aaron Eckhardt for introducing me to this resource.

there in the shower and locker room. Presumably the counselor is there as a matter of legal entitlement under federal antidiscrimination law.

So there this counselor is, this person Bursch describes as a “man” who “identifies as a woman,” naked in the shower and locker room “look[ing] like a man” while the women in that space with “him,” are naked, too.¹⁰ If the counselor’s professional authority is coded male, as it may be, given how hierarchically arranged professional authority can and regularly does work, the central point here is that the counselor’s authority is distinctively embodied. This authority isn’t simply gendered male, it is also vitally sexualized that way, not least because of what is figured as the likeness of the counselor’s body to the reasonably presumably male body or bodies that sexually harmed the women in the shelter through acts of rape, trafficking, and maybe abuse, itself regularly, though not necessarily definitionally, sexualized.¹¹ These sexually injured women’s bodies facing the traumatic sight of what Bursch portrays as their “male” counselor and “his” body in the shower and locker room makes this a scene of sexual injury from which the cis-women are figured as hostage-like, powerless to escape.¹²

¹⁰ Harris Funeral Homes Transcript, *supra* note 3, at 29, 45; *see also infra* note 12. To be very clear, “naked” is not a term that Bursch uses. It is, rather, the understanding that emerges from the larger narrative his argument unfolds, with its account of bodies in showers and locker rooms.

¹¹ The locution in the sentence recognizes that not everyone understands gender to be sexual. For that view, see, for example, CATHARINE A. MACKINNON, *Desire and Power* (1983), in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 46, 50 (1987) (“[G]ender is sexualized. . . . [T]he eroticization of dominance and submission creates gender . . .”). On the relation between domestic violence and sexual violence, see Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635, 651 n.36 (1983) (“Battery of wives has been legally separated from marital rape not because assault by a man’s fist is so different from assault by a penis. Both seem clearly violent. I am suggesting that both are also sexual.”).

¹² For thinking in the briefing that helps frame the scene as involving sexual injury, see Brief for Ryan T. Anderson as Amicus Curiae Supporting Employers at 37, *Altitude Express, Inc. v. Zarda*; and R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, Nos. 17-1623, 18-107 (Aug. 23, 2019) [hereinafter *Anderson Amicus Brief*] (“This privacy concern is particularly acute for victims of sexual assault, who testify that seeing nude male bodies can function as a trigger.”). *Accord* Brief for Defend My Privacy et al. as Amici Curiae Supporting Employers at 6–8, *Bostock v. Clayton Cty.*; *Altitude Express, Inc. v. Zarda*; and R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, Nos. 17-1618, 17-1623, 18-107 (Aug. 21, 2019) [hereinafter *Defend My Privacy Amicus Brief*] (noting effects of trauma and the importance of “safe spaces,” before observing that “[s]urvivors report that seeing a person of the same sex as their assailant is a common trigger”). In a detectably escalated register, see Brief for Professor W. Burlette Carter as Amicus Curiae Supporting Petitioner at 26, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Aug. 22, 2019) (“And sometimes trans people *are* perpetrators. I will offer only one example although there are others. A group of women are suing a shelter in Fresno for making them group shower with a trans woman with male genitalia who, they allege, repeatedly leered at and harassed them.”). *See generally* McGee v. Poverello House, No. 1:18-cv-00768-LJO-SAB, 2019 WL

This account of the shower and locker room scene is clarified and extended in that “other point on the restroom scenario” Bursch offers to the Court at the end of his oral argument.¹³ In this setting, the trans woman’s “male” authority has nothing to do with any professionalized authority she may have, but is attributable strictly to how Bursch characterizes her as a “female-identified” “male,” who has turned up, once again, in the ladies’ shower and locker room. This “male” authority functions here in classic male-dominant form, just like in the “overnight shelter’s” shower and locker room scene: “He” is situated over and above the women “he” finds there, women who, in this retelling, are not expressly identified as victims or survivors of rape, trafficking, or abuse.¹⁴ Indeed, in producing this rendering of the “restroom scenario,” Bursch doesn’t even quite get to saying cis-women are in the shower or locker room with the trans woman he’s describing being there.

The toxic logic of this moment only partially corresponds to the notions of sex that the public originally understood back in 1964, though sex here is in one sense basically binaristic: men and women are the only two sexes and everyone properly belongs either to one or the other, even if trans women are somehow figured as wishing to be on the other side of the sex divide and so in a distinctive sense “straddling” it. Sex is also biologicistic in this scene in the sense that where anyone sits in relation to the sex-difference divide is finally a matter of “natural” morphology, and nothing else. At the same time, sex here is bound up with understandings of it that echo various ideologies of male dominance.¹⁵ It’s the person identified as the “man” in this setting who possesses full control over the scene. It’s the person identified as the “man” in this setting who’s sexually dominating the women under “his” control. It’s the person identified as the “man” in this setting who wills and decides what does or does not happen to those women. “Man” and “woman” here are both nouns as well as the effects of embodied relational dynamics: they are who they are because of their bodies, and they become who they are because of who here is doing what to whom.¹⁶

5596875 (E.D. Cal. Oct. 30, 2019); Defendants Motion for Summary Judgment, *McGee v. Poverello House*, No. 1:18-cv-00768-LJO-SAB, 2019 WL 5596875 (E.D. Cal. Oct. 30, 2019). Importantly, Justice Sonia Sotomayor’s comments during oral argument spotlight the prospects of seeing this scene as a kind of prison and prison guard situation. *See Harris Funeral Homes Transcript*, *supra* note 3, at 36 (describing Bursch’s example of the overnight shelter as “very powerful” and asking whether it “isn’t . . . exactly like *Dothard* [*v. Rawlinson*, 433 U.S. 321 (1997)]?”).

¹³ *Harris Funeral Homes Transcript*, *supra* note 3, at 45.

¹⁴ *Id.* at 29, 45.

¹⁵ *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2595–96 (2015) (mentioning male dominance in relation to the doctrine of coverture); *Kirchberg v. Feenstra*, 450 U.S. 455, 456 (1981) (upholding Louisiana’s “Head and Master” law); WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765–1769, at 421–33 (1979) (discussing coverture, including the relation of “baron” and “feme”).

¹⁶ This helps explain the otherwise perhaps curious-seeming way that conjugal sexuality at times surfaced in the briefing in relation to notions of “sex,” where sex was both

These elements of male dominance inscribed on the trans female body are transphobic in no small part in virtue of their unmistakable and persistent misgenderings. They are also significantly transphobic in the related, dramatic sense that the scenes—which entail a moral lesson about who trans women, or these trans women anyway, are—portray trans women who have not had sex reassignment surgery as villains akin to rapists, traffickers, and abusers, if distinctive from other “men” who do those bad things because they are sexual-injuring hostage-takers who, consistent with Bursch’s understanding of sex, are themselves hostage to their own biological sex, from which they wish to, but cannot ever escape.¹⁷

Formally operating as part of the defense against the claim that anti-trans discrimination is sex discrimination, this transphobia is itself wholly sex-dependent. It involves a straightforward case of “but-for” sex discrimination, making it a spectacular failure as a valid, non-sex-discriminatory argument ventured in the context of a Title VII sex discrimination proceeding.¹⁸ Recognize that this person depicted as a “*man* who identifies as a woman” is a “*woman* who identifies as a woman,” and the shower and locker room scene collapses entirely as a problematic.¹⁹ The scene then becomes what, outside of its repeated representation as an inevitable scene of sexual abuse, it otherwise might have been imagined to be: just another uneventful day in the ladies’ shower and locker room where women, cis and trans, shower and change and go on their way. Bursch’s alternative offers a peephole into a sex-based, anti-trans dystopian nightmare that some cis-men and cis-women especially may

a description of certain types of persons and a specific type of erotic action. *See, e.g.*, Anderson Amicus Brief, *supra* note 12, at 9 (“conjugal marriage”); *id.* at 19–20 (“conjugal sexuality,” “conjugal union,” and “conjugal marital union”); *id.* at 20 (“one-flesh union”); *id.* at 21 (“a man and a woman’s ability to unite as one flesh”); *id.* at 23 (“marital sexuality”); *id.* at 24–25 (“conjugal marriage”); *id.* at 30 (“conjugal marriage”); *id.* at 32 (“conjugal understanding of marriage,” and “conjugal marriage”); *id.* at 33 (“conjugal union of husband and wife,” and “the capacity that a man and a woman have to unite as one flesh”); *id.* at 35 (“conjugal marriage”); *id.* at 36 (“conjugal marriages,” and “conjugal understanding of marriage”). The logic of grammar like this is famously captured by Catharine A. MacKinnon: “Man fucks woman; subject verb object.” Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 541 (1982).

¹⁷ For a point of reflection on some of these nefarious social meanings and Title VII, see Robin Dembroff et al., Essay, *What Taylor Swift and Beyoncé Teach Us About Sex and Causes*, 169 U. PA. L. REV. ONLINE 1, 8 (2020) (“The tangle of counterfactual thought experiments is not mysterious at all once we recognize that the statuses that Title VII forbids from being the basis of discrimination . . . consist in memberships in social categories—categories brimming with often nefarious social meanings. It is, in fact, the *purpose* of antidiscrimination law to revise these nefarious meanings, and to protect individuals from discrimination on the basis of these meanings.”).

¹⁸ *City of L.A., Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (“Such a practice does not pass the simple test of whether the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different.’”) (citation omitted).

¹⁹ Harris Funeral Homes Transcript, *supra* note 3, at 29 (emphasis added); *see also id.* at 45.

find irresistibly and inalterably vexing, a call to arms in opposition to what is portrayed as trans criminality.

Seen for what it is, the shower and locker room scene, its own normativities bound up with certain pornographic conventions, raises elemental questions about whose sexual investments it conforms to and satisfies. At the same time, and equally significantly, it is also deeply and conventionally sexist in its depictions of cis-women. These women and their bodies exist in this imaginary space as helpless, just like the women and their bodies recently arrived at the “overnight shelter” after having been raped, trafficked, and abused by men.²⁰ All cis-women in this setting are eggshell vulnerable in a nonnegotiable way insofar as they’re inevitably harmed by being in the inescapable presence of this trans woman, misgendered as a “man.”²¹ Women here are imaginary figures with no independent interiority or subjectivity.²² Their bodies are conjured in this scene as fawnlike and pawnlike, strategically and fictively placed in close and confined proximity to a naked trans woman in the shower or locker room. In this fantasy, these hapless cis-women witness the trans female body, and the way Bursch’s depiction works is that the witnessing—itself perhaps suggestive of other, more horrific sexual possibilities that are also not directly spoken of—is itself so awful it constitutes its own phallically oriented sexual harm: rape-like, trafficking-like, abuse-like. Bursch’s normatively cis audience—first the Supreme Court Justices, then others—is invited to make of these women their own marionettes, revealing them to be pure objects of individual and collective mental projection, serving as figures in a game in which trans rights and cis-women’s rights, trans desires and cis-women’s needs, are set up as naturally antagonistic to one another, trans women being fictionalized as cis-women’s sexual enemies.

The structure of this imaginary scene is, unsurprisingly, designed to turn at least the five conservative male Justices against the pro-trans sex discrimination claim before the Court, in ways that may make the representation, however inaccurately, seem conventionally homosocial: one man (Bursch) triangulating with other men (the five conservative male Justices) about what another person, figured by Bursch as a “man who identifies as a woman,” might do.²³ The stakes here involve who will get and keep control over the bodies of vulnerable

²⁰ *Id.* at 29.

²¹ *Id.* at 29–30, 45.

²² This perspective has a history that the Supreme Court’s wider sex equality doctrine responds to, and it thus reinforces the idea that the argument being advanced against trans sex discrimination rights is but another attempt that lines up with political and legal projects that, denying women’s subjectivities, agency, autonomy, and power, is against the very women the argument claims to protect. The point is discussed more fully below, *infra* text accompanying notes 24–27, 42.

²³ Harris Funeral Homes Transcript, *supra* note 3, at 29, 45. On homosociality, EVE KOSOFKY SEDGWICK, *BETWEEN MEN: ENGLISH LITERATURE AND MALE HOMOSOCIAL DESIRE* (1985), remains fundamental.

women.²⁴ The impulses the scene is thus suited to trigger are romantic, chauvinistic, and protectionist.²⁵ It offers cis-men the chance to be the white knights who save these imaginary women in need of valiant men to save them from that other “man’s” criminal acts. Bursch is arguing, of course, that that act of heroism can and should come in the nick of time—in the form of an anti-trans ruling in the case by the U.S. Supreme Court.²⁶

Nor is that all. The salvific impulses associated with romantic paternalism, readily mobilized against trans and gay interests, are also subject to being satisfied by a return to now-widely-discredited chauvinistic, sex-protectionist logics that would counsel removing women from possible public zones of workplace danger altogether. Here, the sensibilities of the shower and locker room scene, although specifically a fantasy nightmare of trans female sex abuses of cis-women, converges with the logics of separate spheres ideology that long and broadly kept women from coming under the authority of the wrong men in public and private spaces, barring them unfettered access to the public world of work on the same basic terms as men.²⁷

Needless to say, a call for the reconstitution of separate spheres ideology—either in whole or only in part—is not a tenable argument in a case involving the meaning of Title VII’s sex discrimination ban, itself a nail in separate spheres ideology’s coffin. Unremarkably, Bursch—having generated this thinking about the shower and locker room scene—declines to draw out its logic in ways that make the point overtly, which saves Bursch from having to square it with the pro-cis-woman protectionist vision of Title VII’s sex discrimination ban that his position maintains it involves.

Just so, the logic of separate spheres that travels with the shower and locker room scene remains available as a rough template for a range of interpretive moves that would drain Title VII’s sex discrimination ban of its present-day content. It could do this maximally, by making Title VII into the “joke” its

²⁴ Harris Funeral Homes Transcript, *supra* note 3, at 29–30, 45.

²⁵ See Brief for Appellant at 20–21, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) (quoting *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529, 541 (Cal. 1971)) (“The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage.”); see also *Muller v. Oregon*, 208 U.S. 412, 422 (1908) (noting, in the context of a play to arguments from sex difference and separate spheres ideology, the justifications for legislation regarded as legitimately paternalistically protecting women from “the greed as well as the passion of man” “not merely [for] her own health, but [also] the well-being of the race”). Ruth Colker takes this “reference to the ‘well-being of the race’ . . . to refer to the white race.” Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 155 (2017).

²⁶ See Spindelman, *The Shower’s Return: Part II*, *supra* note 1, at 95 n.28 (“In a stylized way, this may go some distance toward helping to explain the way Bursch’s oral argument focused on the women’s shower and locker room and not on the presence of trans men in the men’s.”).

²⁷ For discussion of separate spheres, including some sources that complicate the standard picture, see JUDITH AREEN ET AL., *FAMILY LAW: CASES AND MATERIALS* 173–76 (7th ed. 2019).

House sponsors once had in mind for it to be, or more modestly, as Bursch's argument indicates, by tabbing the statutory prohibition on sex discrimination to the "natural" or "biological" differences between the sexes in ways that might soon take aim at sex-neutral workplace rules that themselves deny the distinctive "natures" of women and men rather than affirming them.²⁸ A "family values" understanding of Title VII sex discrimination—its contours, and its relation to a new vision of "home" and "work-life balance" elsewhere incipiently sketched—may thus be waiting in the wings.²⁹ To be sure, for any of these changes to be viable, firmly established constitutional sex discrimination rules widely favoring and requiring sex-equal and sex-neutral treatment of women and men would have to be revisited.³⁰ Without raising needless alarms, a Supreme Court decision embracing the shower and locker room scene as the basis for rejecting trans sex discrimination rights in Stephens's case would not "plunge us straightaway" back into a new version of the old world of separate

²⁸ "Sponsors" is used here in a non-technical sense. For details of the "Smith Amendment on sex," "offered . . . in a spirit of satire and ironic cajolery," see Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 441–42 (1966). This "satire and ironic cajolery" took on a different cast and life as debate on the measure proceeded in the House, as generally traced, among other sources, in Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137 (1997). See also *infra* note 29.

²⁹ Thus, Ryan Anderson, after imagining re-imagining what home life could be, including for women, goes on to explain when talking about "work-life balance":

This resetting of priorities requires changing the workplace to make it more hospitable to women. We'll need to begin by acknowledging that men and women really are different, and taking those differences seriously in how we structure the workplace, rather than promoting a policy of sameness. . . . "Preferential treatment of women is justified even if one considers only the requirements of pregnancy, childbirth, and breastfeeding. It would certainly be reasonable to grant only female professors a semester of paid leave after the birth of a child. Male professors in highly unusual situations could petition for exceptions to this general policy." This policy would respect the bodily nature of women and their unique capacity to bear life.

Workplace policies should also recognize that a mother is not interchangeable with other adults, especially when children are young. . . . A healthy society would recognize a mother's preference to care for her child not only as her personal wish but as what's best for her child and for society.

RYAN T. ANDERSON, *WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOVEMENT* 171–72 (2018) (quoting Steven Rhoads). For the more comprehensive argument, see *id.* at 167–72.

³⁰ See, e.g., *United States v. Virginia*, 518 U.S. 515, 531–34 (1996) (offering an account of the Supreme Court's modern sex equality doctrine and some of the "volumes of history" to which it responds). The possibility of revisiting constitutional sex discrimination norms is not new. See, e.g., *id.* at 574–76 (Scalia, J., dissenting) (pointing out prospects of traditional rational basis review of sex-based classifications consistent with pre-1970's sex discrimination caselaw and *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938)).

spheres ideology, but then it would “at least [be] a step in that wrong direction.”³¹

Turning the sexist urgency of the shower and locker room scene around and onto itself like this means to throw a wrench into how it otherwise leverages progressive, especially feminist and pro-feminist, sensibilities as part of an effort to forge a conservative-liberal-progressive alliance in an anti-trans cause.³² In its different iterations, the scene may initially seem deeply pro-feminist: witness all the care, concern, and solicitude lavished on the needs of women who have been raped, trafficked, and abused—needs that are then set in opposition to the actions of trans women represented as peculiar “men” who are criminal sexual injurers. Exposed as part of a regressive, sexist project that targets both trans women and cis-women, it provides no real occasion on which, as it implies, good, decent, right, upstanding people must identify and pick sides. A pro-trans, pro-cis-women, *and* anti-sexual violence politics is yet possible: People do it in different ways all the time. It’s just not available from within the logics of the shower and locker room scene as presented in the case.³³

³¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring in the judgment and opinion of the Court).

³² For one example, see Spindelman, *The Shower’s Return: Part II*, *supra* note 1, at 98 n.36 (noting the alliance of the Women’s Liberation Front and the Family Policy Alliance in the form of an amicus brief in *Gloucester County School Board v. G.G. ex rel Grimm*, 137 S. Ct. 1239 (2017)). A strong press-back (there are many) is in Robin Dembroff, *Trans Women Are Victims of Misogyny, Too – And All Feminists Must Recognize This*, *GUARDIAN* (May 19, 2019), <https://www.theguardian.com/commentisfree/2019/may/19/valerie-jackson-trans-women-misogyny-feminism> [<https://perma.cc/S3T5-UYFG>] (taking the point on directly and in a more general way). The parallels to debates over women’s reproductive rights are noteworthy. *Compare* *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (speculating about women’s “regret” about abortion decisions as a reason to constrain women’s reproductive choices), *with id.* at 183–85 (Ginsburg, J., dissenting) (noting how the majority opinion’s “thinking reflects ancient notions about women’s place in the family and under the Constitution—ideas that have long since been discredited”). For reflections on “women-protective rationales” for restricting women’s rights in the reproductive justice context, see, for example, Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, *Lectures*, 57 *DUKE L.J.* 1641, 1642 (2008) (discussing the “woman-protective rationale for restricting abortion”), and Mary Ziegler, *Women’s Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 28 *BERKELEY J. GENDER L. & JUST.* 232, 232–33 (2013) (engaging “the complexity [and] diversity of the pro-life feminist movement,” while keeping an eye on “woman-protective arguments, such as those endorsed in *Gonzales v. Carhart*”) (citation omitted).

³³ *THE NETWORK/LA RED, OPEN MINDS OPEN DOORS*, *supra* note 9, generally illustrates this. So do, powerfully, from different directions, Dean Spade & Craig Willse, *Norms and Normalization*, in *THE OXFORD HANDBOOK OF FEMINIST THEORY* 551, 557, 562, 566 (Lisa Disch & Mary Hawkesworth eds., 2016) (variously noting the realities and impacts of sexual violence, including its “central[ity] to the system of racial chattel slavery,” discussing how “endemic” “sexual violence and intimate-partner violence remain,” within the context of a critical abolitionist project), and Dean Spade, *Law as Tactics*, 21 *COLUM. J. GENDER & L.* 40, 63 (2011) (“[G]iven the rapid and massive racialized expansion of

Still, the shower and locker room scene has real pull, including the power to generate a sense of dysphoria. This is Justice Sonia Sotomayor during an early exchange with David Cole—even before Bursch’s argument, though it comes after the briefing for Harris Funeral Homes that includes discussion of showers and locker rooms. At this moment, Justice Sotomayor is directing Cole’s attention to the force of the bathroom scene in its conventional sense:

Mr. Cole, let’s not avoid the difficult issue, okay? You have a transgender person who rightly is identifying as a woman and wants to use the women’s bedroom, rightly, wrongly, not a moral choice, but this is what they identify with. Their need is genuine. I’m accepting all of that -- . . . and they want to use the women’s bathroom. But there are other women who are made uncomfortable, and not merely uncomfortable, but who would feel intruded upon if someone who still had male characteristics walked into their bathroom. That’s why we have different bathrooms. . . . And what in the law will guide judges in balancing those things? That’s really what I think the question is about.³⁴

When a Supreme Court Justice, “accepting” that the “need[s]” of trans women are “genuine,” lets loose a reference describing “the women’s bathroom” as “the women’s *bedroom*,” it may be time to ask if it is really only “*other* women who are made uncomfortable, and not merely uncomfortable” but “would feel intruded upon” if someone with “male characteristics” were to walk in on them in “*their* bathroom.”³⁵ How would this point on “the question [the case] is about” look, how might it be expressed, if instead of thinking about the women’s bathroom, the point had been made in the intensified way that Bursch would later make it, where the bathroom scenario is about women’s shower and locker rooms?³⁶ How would these “other women” Justice Sotomayor is talking about feel about a trans woman with what she refers to as

imprisonment in the United States and the disproportionate imprisonment and severe violence faced by trans people in prisons due to the fact that gender and sexual violence are foundational to imprisonment, demanding increased resources for criminalization is likely to further rather than reduce trans vulnerability to violence.”). Lori Watson, *The Woman Question*, 3 TSQ: TRANSGENDER STUD. Q. 246 (2016), also offers a stirring analysis showing how these politics can move together.

³⁴ Harris Funeral Homes Transcript, *supra* note 3, at 10–11. The audio record confirms Justice Sotomayor’s use of “the women’s bedroom.” Oral Argument at 7:29, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Oct. 8, 2019), https://apps.oyez.org/player/#/roberts10/oral_argument_audio/24839 [<https://perma.cc/9QV7-CB6D>] (“the women’s bedroom”).

³⁵ Harris Funeral Homes Transcript, *supra* note 3, at 10–11 (emphasis added).

³⁶ *Id.* at 11. Cole disputed this was “the question” thus: “Well, that is -- that is -- that is a question, Justice Sotomayor. It is not *the* question in this case.” *Id.* (emphasis added). To which she replied: “Mr. Cole, that’s -- yes . . . -- because the -- once we decide the case in your favor, then that question is inevitable.” *Id.* Immediately after this, Justice Sotomayor put “locker rooms” into view. *Id.* at 11–12.

“male characteristics walk[ing] into their” shower and locker room?³⁷ Would they find Bursch’s depiction of the shower and locker room scene “very powerful,” as Justice Sotomayor described his depiction of the “overnight shelter” after hearing him express it?³⁸ Will the shower and locker room scene yet function for these women as a basis for favoring excluding trans women from certain jobs in certain workplaces?³⁹

Critical perspective on the shower and locker room scene is imperative if one is to apprehend—and, bearing witness, perhaps to seek to manage if not overcome—its triggering powers.⁴⁰ Achieving this stance should also help

³⁷ *Id.* at 10–11.

³⁸ *Id.* at 36. As this exchange continued, Justice Sotomayor’s comments moved in directions that seemed to suggest that a women’s shelter that wished to deny a trans woman a job as a counselor might under some circumstances perhaps have a valid bona fide occupational qualification (BFOQ) defense. See *id.* (describing Bursch’s example of the overnight shelter as “very powerful” and asking whether it “isn’t . . . exactly like *Dothard* [v. *Rawlinson*, 433 U.S. 321 (1997)]?”); *id.* (underscoring that *Dothard* “found that it was a BFOQ to make only men guard men and women only guard women” and suggesting that the results Bursch worried about in relation to the overnight shelter wouldn’t obtain via the subtle indication that: “I’m not quite sure that I understand your parade of horrors”); *id.* at 37 (correcting Bursch’s position by describing the pro-trans argument in the case as being that, “if there is an independent reason why a man who’s transgendered [*sic*, it’s “why a trans woman”] can’t have a job that a woman has, then that reason is good enough, you don’t have to hire them”). For another moment earlier in the oral arguments when Justice Sotomayor spoke to the power of the what can happen in locker rooms, see *id.* at 12 (pointing to a situation involving “two locker rooms, men and women, girls and boys and who walks in is something you can’t control”).

³⁹ See *supra* note 38.

⁴⁰ Not that this is always or ever simple or simply a matter of rational choice or an exercise of agency or will. From one vantage point, see Defend My Privacy Amicus Brief, *supra* note 12, at 8–14 (recounting survivors’ experiences). For a view in which trans-inclusive operating rules in the face of realities like these are discussed, see THE NETWORK/LA RED, OPEN MINDS OPEN DOORS, *supra* note 9, at 61–76, 83–88. See generally JULIE DARKE & ALLISON COPE, TRANS ALL. SOC’Y, TRANS INCLUSION POLICY MANUAL FOR WOMEN’S ORGANIZATIONS (2002), <http://www.transalliancesociety.org/education/documents/02womenpolicy.pdf> [<https://perma.cc/R4GK-LPDZ>]. For an important national consensus statement of anti-sexual assault and domestic violence organizations supporting trans inclusiveness, see *National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community*, NTF (Apr. 13, 2018), <http://www.4vawa.org/ntf-action-alerts-and-news/2018/4/12/national-consensus-statement-of-anti-sexual-assault-and-domestic-violence-organizations-in-support-of-full-and-equal-access-for-the-transgender-community> [<https://perma.cc/ZG83-AP3J>]. Different ways of conceptualizing trans exclusion from domestic violence shelters as a legal problem are mapped in Rishita Apsani, *Are Women’s Spaces Transgender Spaces? Single-Sex Domestic Violence Shelters, Transgender Inclusion, and the Equal Protection Clause*, 106 CALIF. L. REV. 1689 (2018). They may become relevant if certain federal policies change. See, e.g., Office of Info. & Regulatory Affairs, *View Rule*, REGINFO.GOV, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2506-AC53> [<https://perma.cc/Z7JM-AVGP>] (describing

frame an inquiry into what it is that is making it possible for trans women in this imaginary setting to be set up to take heat for sexual dangers that are not of their own devising, but rather reflections of non-imaginary, real-world, material dangers that cis-men regularly pose to women, both cis and trans.⁴¹ Why is the solution to cis-male sexual violence stopping trans women from being who they are in traditionally women's spaces?

Approached another way, the shower and locker room scene that Bursch advances may have the cultural purchase it does, despite the problematic romantic paternalisms it involves, because of how the scene taps into deeply entrenched cis-male-dominant ways of organizing social and sexual life—and their violences.⁴² Modern, broadly sex-integrated, cis-female-inclusive forms of public life in the United States have been a norm, after all, for what, across history's vast sweep, is only a brief moment in time.⁴³ Even within this wider moment, trans-inclusivity, indeed trans life itself, may at first blush seem to some to involve a significant rupture with sex-based rules built atop traditional ideas of sexual difference, which widely organize social, including sexual, life,

proposed new rule, RIN: 2506-AC53, allowing federally-funded homeless shelters to provide for trans-exclusions from “single-sex or sex-segregated” shelters under a range of circumstances). *But see* H.R. 3018, 116th Cong. (2019), <https://www.congress.gov/116/bills/hr3018/BILLS-116hr3018rh.pdf> (bill “[t]o prohibit the Secretary of Housing and Urban Development from implementing a proposed rule regarding requirements under Community Planning and Development housing programs”). For further discussion on the proposed rule, see Tracy Jan, *Proposed HUD Rule Would Strip Transgender Protections at Homeless Shelters*, WASH. POST (May 22, 2019), <https://www.washingtonpost.com/business/2019/05/22/proposed-hud-rule-would-strip-transgender-protections-homeless-shelters/> [<https://perma.cc/V7RP-PPS8>] (describing the “proposed new rule” as “allowing federally funded shelters to deny people admission on religious grounds or force transgender women to share bathrooms and sleeping quarters with men”).

⁴¹ See 2015 TRANSGENDER SURVEY REPORT, *supra* note 8, at 206, 208 (noting 54% of respondents experienced some form of intimate partner violence during their lifetimes, 19% had an intimate partner force them to engage in sexual activity, and 35% experienced some form of physical violence by an intimate partner); *see also* Peitzmeier et al., *supra* note 8, at 2385–88, 2391–93. *See generally* TAYLOR N.T. BROWN & JODY L. HERMAN, WILLIAMS INST., INTIMATE PARTNER VIOLENCE AND SEXUAL ABUSE AMONG LGBT PEOPLE: A REVIEW OF EXISTING RESEARCH (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/IPV-Sexual-Abuse-Among-LGBT-Nov-2015.pdf> [<https://perma.cc/94E8-J28N>] (discussing intimate partner violence and sexual abuse in relation to sub-groups within the LGBT communities).

⁴² *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (“There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women not on a pedestal, but in a cage.”); *see also* Brief for Appellant at 21, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) (quoting *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529, 541 (1971) (“The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage.”)).

⁴³ *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 535–39 (1996) (discussing some of this history in the context of higher education). *See generally* Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451 (1978).

along with the social dangers that certain bodies need to be on guard against. No wonder “other women,” as Justice Sotomayor says, may experience aversive, even alarmed, mind-body reactions upon simply hearing the shower and locker room scene described.⁴⁴ Think of this “restroom scenario,” and it is still easy, culturally speaking—remarkably easy as Bursch’s arguments show—to raise specters of trans-inflicted sexual violence against cis-women.⁴⁵ The gesture is in fact so easy to make that an otherwise sympathetic Justice can find herself understandably speaking of the women’s “bedroom” when she means the women’s “bathroom” and characterizing the argument from the “overnight shelter” as “very powerful.”⁴⁶

Much as anything else, these positions reflect a cultural spirit: The ladies’ bathroom, shower, and locker room *are* bedrooms in this culturally-associative sense.⁴⁷ At long last, after tremendous, heroic work, concerns about victims and survivors of sexual and/or domestic abuse are “very powerful,” too.⁴⁸ These things being so, anyone (but, being real about it, distinctively any cis-identified person) who dwells on the shower and locker room scene for long enough may still find themselves being animated toward a “rage” that can grip individuals, as well as “the country.”⁴⁹ Justice Sotomayor was assuredly accurately reporting the views of many cis-women and cis-men, some inclined toward pro-trans positions. The feelings are thus neither purely idiosyncratic nor strictly personal, though, as attitudes about trans people and trans equality change, they may be moving in those directions.⁵⁰ For the time being, they are in no small part about how we share a culturally and historically-specific way of being—a social ontology—that needs to be confronted if it is to be altered in both more sex-equal and pro-trans ways.⁵¹ This social ontology, which the shower and locker room scene taps into, runs deep and is capable of surfacing at and through the

⁴⁴ Harris Funeral Homes Transcript, *supra* note 3, at 10.

⁴⁵ *See id.* at 45.

⁴⁶ *Id.* at 10, 29, 36.

⁴⁷ *See id.* at 10–11, 29–30, 45.

⁴⁸ *Id.* at 36.

⁴⁹ The precise language Justice Sotomayor uses is “raging.” Transcript of Oral Argument at 12, *Bostock v. Clayton Cty.*; and *Altitude Express, Inc. v. Zarda*, Nos. 17-1618, 17-1623 (Oct. 8, 2019) (offering that the “big issue right now raging the country is bathroom usage”).

⁵⁰ A parallel here is found in *Masterpiece Cakeshop*, as discussed in Marc Spindelman, *Masterpiece Cakeshop’s Homiletics*, 68 CLEV. ST. L. REV. 347, 390–402 (2020) (discussing whether the decision by Jack Phillips of Masterpiece Cakeshop to make a custom-made wedding cake for Charlie Craig and David Mullins implicated First Amendment speech rights, while temporizing, hence contextualizing, the claim).

⁵¹ A related set of arguments is deftly delivered in Robin Dembroff, *Real Talk on the Metaphysics of Gender*, 46 PHILOSOPHICAL TOPICS (Takaoka & Manne eds., forthcoming) (on file with author).

level of reason.⁵² Unfortunately, on close inspection, that reason pervasively still entails the dehumanizing and marginalizing unreason of transphobia—and sexism. This is why trans sex discrimination protections, nested at these intersections, are so necessary, but also partly why those protections may seem to so many to unsettle so much and to put so much on the line.⁵³ Anti-trans logics are powerfully culturally resonant, a central part of what the trans-equality project, now fully joined within the wider LGBT equality movement, is up against in an elementary sense.⁵⁴

Recognizing this may make it somewhat easier to apprehend how efficiently Bursch—via the merest of rhetorical gestures—could with so few words so quickly and repeatedly construct transphobic castles in the sky out of ladies’ showers and locker rooms as a form of what some may experience as a decisive argument against any—and all—trans rights. At the level of non-transphobic reason, it should be deeply reassuring to those whose understanding is still evolving in relation to trans people and trans equality that Bursch had to concoct his case in the realm of narrative speculation. After a generation of trans sex equality cases, Bursch—notably—did not tell the Supreme Court about one single actual instance as the basis for the shower and locker room scenes he depicted, though there can be no real doubt that, if he had found one, he would have told the Court about it instead of relying on hypotheticals that he himself

⁵² Compare Jeannie Suk Gersen, *The Transgender Bathroom Debate and the Looming Title IX Crisis*, NEW YORKER (May 24, 2016), <https://www.newyorker.com/news/news-desk/public-bathroom-regulations-could-create-a-title-ix-crisis> (“The discomfort that some people, some sexual-assault survivors, in particular, feel at the idea of being in rest rooms with people with male sex organs, whatever their gender, is not easy to brush aside as bigotry.”), with Chase Strangio, *There Is Only a Title IX Crisis if You Believe the Existence of Trans People Is Up for Debate*, SLATE (May 27, 2016), <https://slate.com/human-interest/2016/05/jeannie-suks-newyorker-com-article-was-sloppy-and-inaccurate.html> [<https://perma.cc/U2TH-MTML>] (critiquing Suk’s thinking, but also allowing that “[p]erhaps Suk is correct that bigotry isn’t the sole motivation behind the recent spate of laws driving trans people out of public life[;] [b]ut laws need not be driven by pure bigotry in order to be morally and legally wrong”). For another perspective, see Meghan Murphy, *There Is No Problem with Trans People in Bathrooms*, FEMINIST CURRENT (Oct. 9, 2019), <https://www.feministcurrent.com/2019/10/09/there-is-no-problem-with-trans-people-in-bathrooms/> [<https://perma.cc/X3RE-7L63>].

⁵³ On “sex” operating as an exclusionary concept, the re-inclusion of which can bust the category, see Lee Edelman, *Tearooms and Sympathy, or, The Epistemology of the Water Closet*, in THE LESBIAN AND GAY STUDIES READER 553, 564 (Henry Abelove et al. eds., 1993) (discussing homosexuality’s exclusion as something that reinforces male-female sex difference); *id.* at 568 (discussing this in the context of homosexuality, the normativity of which can be “so radical . . . it figures futurity imperiled, it figures history as apocalypse, by gesturing toward the precariousness of familial and national survival”).

⁵⁴ There is a painful history of intra-community division here. For but one of many sources on the subject, see generally Mubarak Dahir, *Whose Movement Is It?*, THE ADVOCATE, May 25, 1999, at 50. See also Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, in THE TRANSGENDER STUDIES READER 244, 245–46 (Susan Stryker & Stephen Wittle eds., 2006).

made up.⁵⁵ Lacking one, Bursch's audience, prominently and specifically the Supreme Court, has no secure foundation for figuring an attack on a non-trans woman—indeed, on any woman or anyone else—by a trans woman in a shower or locker room as a predicate for its decision in the case.

It is regularly true, as the saying goes, that it gets better. Sometimes, though, as with the arguments ventured in Stephens's case, it actually gets worse before it gets better.

⁵⁵ Not discussed at oral argument was a case mentioned in Harris Funeral Homes's merits brief involving a religious shelter in Alaska that may be thought to provide a template for the "overnight shelter" hypothetical he raised. Brief for the Petitioner at 52–53, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Oct. 9, 2019) (discussing the case). The case itself did not involve a trans counselor. *See Downtown Soup Kitchen v. Anchorage*, 406 F. Supp. 3d 776, 781–84 (D. Alaska 2019). Various amicus briefs focused on this case as well. *See, e.g.*, *Defend My Privacy Amicus Brief*, *supra* note 12, at 11–14. Bursch himself returned to the case elsewhere. John Bursch, *Difficult Issues Involving Human Sexuality Require Dialogue, Not Scorn, Misinformation*, HILL (Oct. 15, 2019), <https://thehill.com/blogs/congress-blog/civil-rights/465844-difficult-issues-involving-human-sexuality-require-dialogue> [<https://perma.cc/2FLA-LQYA>] ("In Alaska, local officials redefined 'sex' to try and force a women's overnight shelter to allow a man identifying as a woman to sleep mere feet away from women who have been raped, trafficked and abused. A federal court enjoined that bureaucratic effort."). Other instances, even more vivid, also notably absent from Harris Funeral Homes's briefing and Bursch's oral argument, are found *supra* note 12. *See also, e.g.*, Brief for National Organization for Marriage and Center for Constitutional Jurisprudence as Amicus Curiae Supporting Respondent in No. 17-1618 and Petitioners in Nos. 17-1623, 18-107 at 13–14, *Bostock v. Clayton Cty.; Altitude Express, Inc. v. Zarda*; and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, Nos. 17-1618, 17-1623, 18-107 (Aug. 22, 2019) (discussing a case from Washington state in which "a woman who had suffered sexual abuse as a child was fired from her job for declining to go along with the YMCA's recent policy mandating that women's locker rooms and showers be open to men," even though "the policy re-awakened her old trauma"); Brief for Women's Liberation Front as Amicus Curiae Supporting Petitioner at 14, 14 n.22, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Oct. 9, 2019) (describing a case from the United Kingdom involving "a man who goes by [a female name], who had previously been convicted of rape, was placed in a women's prison where he went on to sexually assault additional women.").

The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part IV

MARC SPINDELMAN*

I. THE TRANS SHOWER, ANOTHER TAKE— FROM CRIMINALITY TO MADNESS AND MONSTROSITY¹

Having come this far with Bursch's argument, it is possible to follow the anti-trans cultural fantasies that the shower and locker room scene trades in as they take a darker turn within the larger case that Bursch and his team offered to the Supreme Court on Harris Funeral Homes's behalf.

After exhausting its case for a trans-exclusive reading of Title VII's sex discrimination ban based on "sex's" original public meaning, and after responding to the claim that Title VII's ban on sex stereotyping covers anti-trans discrimination, the merits brief for Harris Funeral Homes openly confronts the prospect that the Supreme Court's decision will not be based on conservative jurisprudential grounds but on judicial policy preference.² Not to miss out on this possible action, the brief tees up a series of first-order policy claims unleashed in rapid-fire succession, all pinned under a section heading

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¹ Earlier parts of this work appear as Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part I*, 81 OHIO ST. L.J. ONLINE 81 (2020); Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part II*, 81 OHIO ST. L.J. ONLINE 87 (2020); and Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part III*, 81 OHIO ST. L.J. ONLINE 101 (2020).

² Brief for the Petitioner at 17–42, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 16, 2019).

announcing that “[r]edefining sex discrimination will cause problems and create harms.”³

Naturally, showers and locker rooms make an appearance in this section of the merits brief, which eventually takes paternalism to some thin-air heights.⁴ One of the brief’s most astounding contentions is that a pro-trans decision in the case may prove *harmful*, but not, as might be expected at this point, to cis-women.⁵ Nor is it that a pro-trans ruling in the case would harm employers, though the brief does indicate that they would be improperly saddled with additional constraints on their choices were the Supreme Court to rule for Aimee Stephens.⁶ Instead, the brief stakes out the position that a pro-trans, trans-discrimination-is-sex-discrimination ruling in the case will inflict “potential harm” on trans people themselves, described in clinical-sounding terms as suffering “gender-identity issues.”⁷

The merits brief’s text plays this particular anti-trans chord softly. Subtly, mutedly, the brief evinces what, read in context, might generously be defended as pastoral care, concern, and even love toward trans people whose rights, as conventionally understood, it is actively turning the screw against.⁸ According

³ *Id.* at 45.

⁴ *See id.* (the section captioned “[r]edefining sex discrimination will cause problems and create harms,” in which this argument appears, includes mention of “showers, restrooms, and locker rooms”); *id.* at 46 (citing to New Mexico’s “nondiscrimination law” and parenthetically noting an exception in it for “sex-specific ‘sleeping quarters,’ ‘showers,’ and ‘restrooms’”). This is not to forget how the brief elsewhere does make just this point about how a pro-trans decision would be harmful to cis-women. *Id.* at 4 (discussing allowing men in domestic abuse shelters with “female survivors of rape and violence.”).

⁵ This argument does come up in this section of the brief, as anticipated in *id.* at 4 (noting harms to “women and girls” who “compete in sports,” and to “female survivors of rape and violence”); *see id.* at 47–48, 50–53. The brief also notes the “substantial infringements of free speech and religious freedom in the workplace,” *id.* at 48–50, and that “[r]edefining sex discrimination by judicial fiat will . . . directly undermine the separation of powers,” *id.* at 53.

⁶ These arguments are summarized in *id.* at 4, and repeated in greater detail in *id.* at 45–46, 49–50 (discussing harms to employers).

⁷ Brief for the Petitioner at 4, 54, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Aug. 16, 2019). Additionally, the brief says, specifically: “As to the specific gender-identity issues at stake here, it is not at all clear that judicially amending Title VII as the Sixth Circuit did will have the ameliorative effects that some assume.” *Id.* at 54.

⁸ *See, e.g., id.*; *see also* John Bursch, *Difficult Issues Involving Human Sexuality Require Dialogue, Not Scorn, Misinformation*, HILL (Oct. 15, 2019), <https://thehill.com/blogs/congress-blog/civil-rights/465844-difficult-issues-involving-human-sexuality-require-dialogue> [<https://perma.cc/2FLA-LQYA>] (“There’s no question that people experiencing gender dysphoria deserve compassion and respect. There are, however, many unresolved questions and ongoing conversations about the best ways to respect *all* Americans’ dignity and privacy. Such dialogue, and not misinformation, is what Americans need.”). For a view along similar lines that ultimately reach love, *see* RYAN T. ANDERSON, *WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOVEMENT* xvi (2018) (“I repeatedly acknowledge that gender dysphoria is a serious condition, that people who

to the brief, the conventional pro-trans arguments have been out of touch with reality, hence wrong, and *anti-trans*, all along, including in this instance. This is because:

As to the specific gender-identity issues at stake here, it is not at all clear that judicially amending Title VII as the Sixth Circuit did [in pro-trans directions] will have the ameliorative effects that some assume. The science regarding gender identity is far from settled, and there are deep disagreements over whether otherwise healthy bodies should be physically modified to align with the mind. The opposite approach—aligning one’s mind with the body—has traditionally been the preferred method for treating other dysphorias, such as anorexia and xenomelia (believing that one or more limbs do not belong).⁹

Bracketing the arch invocation of xenomelia, with its intimation that being trans, specifically a trans woman, is akin to wanting to cut off “one or more limbs,” the brief’s otherwise ostensibly measured chords proceed to sound an “additional reason for caution.”¹⁰

The brief observes that “one of the most comprehensive scientific studies tracking individuals who underwent sex-reassignment surgery revealed that postoperative outcomes were surprisingly negative.”¹¹ The self-description in this 2011 study raises a flag about its perspective, including its utility as comparative social science that crosses national, cultural, and temporal boundaries. This study is a “population-based matched cohort study,” its “[s]etting”: “Sweden, 1973–2003.”¹² For itself, the study indicates that its

experience a gender identity conflict should be treated with respect and compassion, and that we need to find more humane and effective ways to help people who find themselves in that situation.”); *id.* at 173 (“We should be tolerant—indeed, loving—toward those who struggle with their gender identity, but also be aware of the harm done to the common good, particularly to children, when transgender identity is normalized.”).

⁹ Brief for the Petitioner at 54, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 16, 2019) (citations omitted). For earlier commentary that, in part, engages this language from the brief, see Chase Strangio, *These Hate Groups Want the Supreme Court to Erase Trans People*, OUT (Aug. 28, 2019), <https://www.out.com/commentary/2019/8/28/these-hate-groups-want-supreme-court-erase-trans-people> [<https://perma.cc/AMA9-99V9>].

¹⁰ Brief for the Petitioner at 54, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 16, 2019).

¹¹ *Id.* (citing Cecilia Dhejne et al., *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, 6 PLoS ONE 1 (2011), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0016885&type=printable> [<https://perma.cc/38HU-X4ZQ>]).

¹² Cecilia Dhejne et al., *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, 6 PLoS ONE 1, 1 (2011), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0016885&type=printable> [<https://perma.cc/38HU-X4ZQ>]. Why this study is probative in the present context in the United States is not discussed. For related thoughts, see Günter Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 HARV. INT’L L.J. 411 (1985) (mapping

objective is “[t]o estimate mortality, morbidity, and criminal rate after surgical sex reassignment of transsexual persons.”¹³ Measuring death and disease rates is one thing, but what explains this interest in “criminal rate after surgical sex reassignment of transsexual persons”?¹⁴ This may be objective social science, but the study—apparently to the chagrin of one of its co-authors—has shown itself highly amenable to being inducted into the service of anti-trans projects that advance presumptions of trans-female criminality, as discovered in the shower and locker room scenario Bursch has put forward.¹⁵ The study documents that some trans people have “considerably higher risks for mortality, suicidal behaviour, and psychiatric morbidity than the general population,” though it warns that its results should not be taken to mean that “sex reassignment *per se* increases morbidity and mortality.”¹⁶ Still, that is an implication that emerges from the merits brief, which ventures that sex reassignment surgery associated with gender identity disorder involves “surprisingly negative” “outcomes,” not that social forces like sexism, including paternalism, operating in anti-trans ways do.¹⁷ No matter that these social forces

relevant thoughts on comparative law method and cross-culture practice). For further thoughts, see Richard Bränström & John E. Pachankis, *Reduction in Mental Health Treatment Utilization Among Transgender Individuals After Gender-Affirming Surgeries: A Total Population Study*, AM. J. PSYCHIATRY (forthcoming) (manuscript at 1), <https://ajp.psychiatryonline.org/doi/pdf/10.1176/appi.ajp.2019.19010080> (concluding “[i]n this first total population study of transgender individuals with a gender incongruence diagnosis, the longitudinal association between gender-affirming surgery and reduced likelihood of mental health treatment lends support to the decision to provide gender-affirming surgeries to transgender individuals who seek them”).

¹³ See Dhejne et al., *supra* note 12, at 1.

¹⁴ *Id.*; see also Elijah Adiv Edelman, *Beyond Resilience: Trans Coalitional Activism as Radical Self-Care*, 38 SOC. TEXT 109, 117 (2020) (noting trans suicide attempt rates).

¹⁵ Detail: According to the study, “[f]emale-to-males, but not male-to-females, had a higher risk for criminal convictions than their respective birth sex controls.” Dhejne, *supra* note 12, at 1. Bursch’s discussions of the shower and locker room scene don’t dwell on this to say the least. See, e.g., Transcript of Oral Argument at 29–30, 37–38, 45, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Aug. 16, 2019), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_4gcj.pdf [<https://perma.cc/8X32-Y5GT>] [hereinafter Harris Funeral Homes Transcript]. Robin Fretwell Wilson documents the critical uptake of this study as seen from the point of view of one of its co-authors, see Robin Fretwell Wilson, *Being Transgender in the Era of Trump: Compassion Should Pick Up Where Science Leaves Off*, 8 U.C. IRVINE L. REV. 583, 603–04 (2018). For an interview with Cecilia Dhejne, the lead co-author of the study, see Cristan Williams, *Fact Check: Study Shows Transition Makes Trans People Suicidal*, TRANSADVOCATE (Nov. 2, 2015), https://www.transadvocate.com/fact-check-study-shows-transition-makes-trans-people-suicidal_n_15483.htm [<https://perma.cc/M7D2-XVZN>].

¹⁶ Dhejne et al., *supra* note 12, at 1, 7.

¹⁷ Brief for the Petitioner at 54, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Aug. 16, 2019) (“Raising additional reason for caution, one of the most comprehensive scientific studies tracking individuals who underwent sex-reassignment surgery revealed that postoperative outcomes were surprisingly negative.”).

unquestionably help marginalize and oppress trans people and make trans life be as socially and existentially precarious as it is.

Past these details, the brief's observations can be collected and rendered in plain English. Those suffering from gender dysphoria, a group which the brief notes includes children, should not be encouraged to abandon their "otherwise healthy bodies" while seeking to "physically modif[y] [them] to align [them] with the mind."¹⁸ People suffering from gender dysphoria should instead be encouraged to get the traditionally preferred method for treating other "dysphorias": treatment that will help them "align . . . mind with the body."¹⁹

This solution is, of course, a reference to psychiatric care, a vision that transports the brief back to a time and place in which psychiatric cure—getting people to abandon their thoughts of not belonging to the sex they were assigned at birth—was the preferred method for "dealing with" these ways of non-cis life.²⁰ The brief itself does not formally raise the specter of the asylum, but the study that it cites does: "Sex-reassigned persons also had an increased risk for . . . psychiatric inpatient care."²¹ Continuous with logics the brief hews, this prospect may, in some cases, be part of the preferred method for the legal management of trans people, far superior, anyway, to treating "a man who identifies as a woman" as the woman they are not, and giving them sex discrimination protections under law not originally meant for them.²² That, after all—giving trans people anti-discrimination protections under Title VII's sex discrimination law—is what the brief indicates may be harmful, presumably because it would legitimate and normalize trans life and thereby drive trans people toward the health risks associated with their "dysphoria[]." ²³ In this respect, trans people, specifically certain trans women, are not only represented as cis-women's natural enemies. They are also represented as enemies to

¹⁸ *Id.* at 54–56. Note that this does locate the brief broadly in the "conversion therapy" debates. What this may mean for the brief's sympathies for conversion therapy not in the setting of trans equality rights remains out of view. Thanks to James Pfeiffer for the initial notation.

¹⁹ *Id.* at 54.

²⁰ See Transcript of Oral Argument at 6, *Bostock v. Clayton Cty.*; and *Altitude Express, Inc. v. Zarda*, Nos. 17-1618, 17-1623 (Oct. 8, 2019), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/17-1618_b97c.pdf [<https://perma.cc/9TZZ-FHMR>] [hereinafter *Bostock Transcript*] ("JUSTICE GINSBURG: . . . Ms. Karlan, how do you answer the argument that back in 1964, this could not have been in Congress's mind because in -- in many states male same-sex relations was a criminal offense; the American Psychiatric Association labeled homosexuality a -- a mental illness?"). See also generally RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* (1987); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION* (Robert Hurley trans., Pantheon Books 1978) (1976).

²¹ Dhejne, *supra* note 12, at 1.

²² *Harris Funeral Homes Transcript*, *supra* note 15, at 29, 44.

²³ See Brief for the Petitioner at 4, 54, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 16, 2019). For the fuller argument, see *id.* at 54–55.

themselves.²⁴ In this anti-trans respect at least, cis-women and trans women can at last be affirmed to be alike. Out of reach at the moment is a critical perspective that puts the male-female sex binary itself in its sights.²⁵

Conveniently, the merits brief relies on the authority of a fellow-traveler for the proposition that the “traditional” approach “for treating other dysphorias” is how this “dysphoria[]” should be treated.²⁶ The authority, an amicus brief filed by Dr. Paul R. McHugh, M.D., the University Distinguished Service Professor of Psychiatry at the Johns Hopkins University School of Medicine, an eminent and famously conservative psychiatrist, identifies itself as siding with the funeral home, not Stephens, a formality that speaks to its own understanding of whose side it is on.²⁷ McHugh’s amicus brief is more direct and emphatic than Harris Funeral Homes’s merits brief, and, in its way, than Bursch’s oral argument, but the positions between and among them bear notable family resemblances to one another that should be recognizable by this point.

²⁴ See *id.* at 54–56.

²⁵ For an important perspective on it, see Mary Joe Frug, Commentary, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1075 (1992) (“Only when sex means more than male or female, only when the word ‘woman’ cannot be coherently understood, will oppression by sex be fatally undermined.”). See also ANDREA DWORKIN, WOMAN HATING 183 (1974) (footnote omitted) (“*We are, clearly, a multi-sexed species which has its sexuality spread along a vast fluid continuum where the elements called male and female are not discrete. . . . If human beings are multisexed, then all forms of sexual interaction which are directly rooted in the multisexual nature of people must be part of the fabric of human life, accepted into the lexicon of human possibility, integrated into the forms of human community.*”).

²⁶ Brief for the Petitioner at 54, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Aug. 16, 2019).

²⁷ *Id.*; Brief for Dr. Paul R. McHugh, M.D., Professor of Psychiatry as Amicus Curiae Supporting Petitioner, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Aug. 22, 2019); cf. Dean Spade, *Mutilating Gender*, in THE TRANSGENDER STUDIES READER 315, 320 (Susan Stryker & Stephen Whittle eds., 2006) (“*Anne Bolin quotes an MTF she spoke with: ‘[Psychiatrists and therapists] . . . use you, suck you dry, and tell you their pitiful opinions, and my response is: What right do you have to determine whether I live or die?’*”) (citing CLAUDINE GRIGGS, S/HE: CHANGING SEX AND CHANGING CLOTHES 32 (1998) (italics in original)) [hereinafter Spade, *Mutilating Gender*]. It is worth tracing the operation of thinking along these lines in U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE REPORT AND RECOMMENDATIONS ON MILITARY SERVICE BY TRANSGENDER PERSONS 2, 19–27, 44 (Feb. 2018), <https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF> [<https://perma.cc/55KQ-HXJG>] (discussing “mental health” standards in relation to exclusion of trans persons from military service, seen to threaten “effectiveness, lethality, and survivability”).

“Sex,” according to the McHugh brief, is an “undeniable,” “objective,” “biological reality.”²⁸ Trans identity, by contrast, is a “disbelief in this reality.”²⁹ The McHugh brief continues:

No matter how difficult the condition of gender dysphoria may be, nothing about it affects the objective reality that those suffering from it remain the male or female persons that they were in the womb, at birth, and thereafter – any more than an anorexic’s belief that she is overweight changes the fact that she is, in reality, slender.³⁰

In a non-clinical sense, this characterization of trans people portrays them as suffering from a dictionary definition of *psychosis*: a “severe mental illness characterized by loss of contact with reality.”³¹ The severity here is attested to in its way by the McHugh brief’s intervention, which points out the realities that trans people have lost touch with are those of “objective” sex.³² The brief advises that, instead of pretending, Hans Christian Andersen-like, that trans women and men are anything but who they “really” are—the sex “they were in the womb, at birth, and thereafter”—“the contemporary transgender parade” must be stopped, for it is plainly “shrink[ing] from . . . clear facts.”³³ Almost comically, the brief shifts to a curious third-person voice that adverts to and positions itself at least partially within the narrative of *The Emperor’s New Clothes*, proudly announcing that: “McHugh [has] recognized that he is ‘ever trying to be the boy among the bystanders who points to what’s real. [He does] so not only because truth matters, but also because overlooked amid the hoopla . . . stand many victims.’”³⁴ Victims—the victims here are the naked emperors this boy is pointing to, all of whom are trans—who “[f]rom a medical and scientific standpoint” could be helped through psychiatric care that, as

²⁸ Brief for Dr. Paul R. McHugh, M.D., Professor of Psychiatry as Amicus Curiae Supporting Petitioner at 5–9, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 22, 2019). The notion of objectivity appears in different forms in the brief. *See, e.g., id.* at 2 (“‘sex’ has consistently referred to be objectively and biologically male or female”); *id.* at 6 (describing “sex” as “objectively recognizable, not assigned”).

²⁹ *Id.* at 5.

³⁰ *Id.* at 10.

³¹ *Psychosis*, OXFORD ENGLISH DICTIONARY (3d ed. 2007).

³² *See supra* note 28.

³³ Brief for Dr. Paul R. McHugh, M.D., Professor of Psychiatry as Amicus Curiae Supporting Petitioner at 4, 10, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 22, 2019) (citation omitted).

³⁴ *Id.* at 4–5 (second alteration in original). For a classic translation of the famous tale, see Hans Christian Andersen, *The Emperor’s New Clothes*, in *THE COMPLETE FAIRY TALES AND STORIES* 77 (Erik Christian Haugaard trans., 1974).

Harris Funeral Homes's merits brief notices, would get the mind to conform to the body's truth.³⁵

Dropped into the shower and locker room scene, which is thus revealed as a capacious vessel for conveying a full range of anti-trans forms, this thinking reconfigures that scene as a scene of possibility in which trans women aren't only common sexual criminals or criminal-like persons akin to rapists, traffickers, and domestic abusers. The trans women in the showers and locker rooms—like all trans people, according to the larger thought—are out of their minds, living lives mentally broken from the world's realities, including those of bodily sex. The study the merits brief cites establishes a trans penchant for lethality that is regularly turned inward, directed at themselves, but the shower and locker room scene, as a fantasy construction, advertises the prospect that this lethality might be redirected outward, thence inflicted by trans women on others.³⁶ Here trans women are elevated from among the ranks of common criminals to the circles of the criminally insane.³⁷ This is a profound dishonor.

Notably, the maneuver does not lay the predicate for a legal excuse. What it is, is the basis for a social and legal indictment.³⁸ As excruciating as it is to encounter it, trans criminality, as constructed in these arguments, involves not the actions of a rational actor but a mentally-ill sexual aggressor, a sexual monster in this sense, reminiscent of old, hateful cultural visions and nightmares of male-female, intersexed beasts.³⁹ Who can be sure what this figure, being a

³⁵ Brief for Dr. Paul R. McHugh, M.D., Professor of Psychiatry as Amicus Curiae Supporting Petitioner at 5, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Aug. 22, 2019) (citation omitted); *supra* note 9 and accompanying text. A similar note of victimization expressed with greater specificity is in ANDERSON, *supra* note 8, at 4 (“After listening to trans activists, we will hear from their victims: people who have transitioned and come to regret it.”).

³⁶ See Dhejne et al., *supra* note 12, at 6 (“In line with the increased mortality rate from suicide, sex reassigned individuals were also at a higher risk for suicide attempts, though this was not statistically significant for the time period 1989–2003”); *id.* (“[M]ale-to-females are at a higher risk for suicide attempts after sex reassignment, whereas female-to-males maintain a female pattern of suicide attempts after sex reassignment[.]”).

³⁷ Andrea Long Chu, *My New Vagina Won't Make Me Happy*, N.Y. TIMES (Nov. 24, 2018), <https://www.nytimes.com/2018/11/24/opinion/sunday/vaginoplasty-transgender-medicine.html> [<https://perma.cc/A9TX-H2TH>] (observing, after describing the author's own experiences with “dysphoria,” “[m]any conservatives call this crazy”). A reply is in ANDERSON, *supra* note 8, at xv–xvi (“Of course I never call people with gender dysphoria ‘crazy.’ And in this book I explicitly state that I take no position on the technical question of whether someone's thinking that he or she is the opposite sex is a clinical delusion. . . . I recognize the real distress that gender dysphoria can cause, but never do I call people experiencing it crazy.”).

³⁸ The legal indictment here is, of course, highly stylized.

³⁹ Some of this history is noted in Marc Spindelman, Obergefell's *Dreams*, 77 OHIO ST. L.J. 1039, 1096–1101 (2016). A different dimension of this history is noted in Jessica A. Clarke, *How the First Forty Years of Circuit Precedent Got Title VII's Sex Discrimination Provision Wrong*, 98 TEX. L. REV. ONLINE 83, 110 (2019) (following anti-trans ideas in Mary

mentally disturbed, possibly deranged force will do? The figure is unknown, unknowable, unpredictable, though most assuredly sexually violent. What might this mean for the *mise-en-scène* of naked bodies in the ladies' shower and locker room? Will the scene be limited to the fright and resultant trauma of women looking at these crazed, criminal bodies? Will those bodies seek some kind of merger with the cis-women's bodies in the scene, and if so, in what combinations? Will these crazed, criminal bodies use physical violence or the threat of it, perhaps in the form of "rage" directed against the women that these bodies-minds think they are or wish to be? Stepping outside the logics of the shower and locker room scene, it must be asked: Is this mythic, unhinged queer monster itself a complex projection of what may be seen to be behind it—the homicidal panic of imaginary cis-straight men?

What's being discussed here are the operations of deep ways of social being that are themselves embedded in a cultural setting that has long constructed trans people as both sexual threats and criminally insane—notions that are readily reactivated as part of an argument seeking to turn back a pro-trans sex discrimination claim through a wink-and-nod group smear involving trans criminality.

The cultural stage for these maneuvers has already been set in an important way by another renowned Baltimore-based psychiatrist and one of his erstwhile clients.

The Silence of the Lambs, that unforgettable cultural representation featuring Dr. Hannibal Lecter, himself a memorable combination of intelligence, erudition, cultural refinement, with savagery, and, don't forget, campiness ("Oh, and, Senator, just one more thing. *Love your suit!*"), involves his one-time patient "Buffalo Bill," "real" name: Jame Gumb, who believes

Daly's and Janice Raymond's work). A stunning reversal of trans monstrosity that recognizes the justice-inflected sense of anti-anti-trans rage, partly responding to the medicalization, including the psychiatrization, of trans life is in Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, in *THE TRANSGENDER STUDIES READER* 244, 245 (Susan Stryker & Stephen Whittle eds., 2006) ("Like the monster [Mary Shelley's *Frankenstein*], I am too often perceived as less than fully human due to the means of my embodiment; like the monster's as well, my exclusion from human community fuels a deep and abiding rage in me that I, like the monster, direct against the conditions in which I must struggle to exist."); *id.* at 246 ("I want to lay claim to the dark power of my monstrous identity without using it as a weapon against others or being wounded by it myself. . . . Just as the words 'dyke,' 'fag,' 'queer,' 'slut,' and 'whore' have been reclaimed, . . . words like 'creature,' 'monster,' and 'unnatural' need to be reclaimed by the transgendered. [This way] . . . we may dispel their ability to harm us."); *id.* at 249 ("Rage colors me. . . . It is a rage bred by the necessity of existing in external circumstances that work against my survival."); *id.* at 254 ("[W]e transsexuals often suffer for the pain of others, but we do not willingly abide the rage of others directed against us. . . . I assert my worth as a monster in spite of the conditions my monstrosity requires me to face, and redefine a life worth living."). Another urgent reversal, this one of anti-intersex thought and practice is in Cheryl Chase, *Hermaphrodites with Attitude: Mapping the Emergence of Intersex Political Activism*, in *THE TRANSGENDER STUDIES READER* 300 (Susan Stryker & Stephen Whittle eds., 2006) (tracking, mapping, and prospecting a normative intersex politics).

himself to be “transsexual” and who kidnaps women and holds them hostage before killing them and skinning them to make a woman’s skinsuit he can wear so as to give himself the appearance of the female body that he wants and wants to be.⁴⁰

The film’s narrative indicates the symbolic danger that may be thought to be lurking within the shower and locker room scene. It posits not a sweet, innocuous trans woman but one who’s capable of terrifying, rageful escalations, as when Gumb famously tells Catherine Martin, one of his victims being held in a pit, “It places the lotion in the basket,”⁴¹ until Catherine’s noncompliant attempts to negotiate and humanize herself in Gumb’s eyes causes Gumb to snap and bark directly at her in a deep, booming, menacing, and completely masculine voice: “Put the *fucking* lotion in the basket!”⁴² Here is a cultural narrative giving instruction that trans women, detestably figured in this representation as a criminally insane cultural subject, may never, but could always lose it like that, including in the shower and locker room hostage scene.

Needless to say, these cultural logics are awful, hateful, and wildly riven by their own spectacularly unhinged anti-trans normativity. They also importantly build on what, in the setting of the film, is an important, but easily missed, misidentification. Although Jame Gumb apparently identifies as “transsexual,” Lecter’s professional assessment is that that is not the case. In an exchange between Lecter and a puzzled FBI Special Agent-in-training Clarice M. Starling, Starling indicates she cannot quite figure what to make of Gumb’s pattern of criminal violence given what she knows about “transsexualism.” She authoritatively reports to Lecter: “There’s no correlation in the literature between transsexualism and violence, transsexuals are very passive.”⁴³ Lecter praises Starling: “Clever girl!”⁴⁴ He then informs her that Gumb, who wasn’t “born a criminal . . . [but] was made one through years of systematic [childhood] abuse,” is “not a real transsexual, but he thinks he is, he tries to be, he’s tried to be a lot of things, I expect.”⁴⁵ Of “Buffalo Bill” (really Gumb)

⁴⁰ THE SILENCE OF THE LAMBS 104:43 (Orion Pictures 1991). For easy access to this clip, see Movieclips, *The Silence of the Lambs (7/12) Movie CLIP - Love Your Suit (1991) HD*, YOUTUBE (July 30, 2013), <https://www.youtube.com/watch?v=RZAkOfxIW6g> [<https://perma.cc/6N6M-JQRJ>] (“Love your suit!”). For discussion that may be used to configure Gumb’s performance for the camera as a paraphilic act of “autogynephil[ia],” see Sheila Jeffreys, *The Politics of the Toilet: A Feminist Response to the Campaign to ‘Degender’ a Women’s Space*, 45 WOMEN’S STUD. INT’L F. 42, 49 (2014) (borrowing the term of a certain type of paraphiliac coined by Ray Blanchard, “autogynephile”). The term “autogynephilia” “refers to a man who is aroused by the thought of himself as a woman[.]” Laura Cameron, *How the Psychiatrist Who Co-Wrote the Manual on Sex Talks About Sex*, VICE (Apr. 11, 2013), https://www.vice.com/en_us/article/ypp93m/heres-how-the-guy-who-wrote-the-manual-on-sex-talks-about-sex [<https://perma.cc/SS4K-2YJR>].

⁴¹ THE SILENCE OF THE LAMBS, *supra* note 40, at 58:27.

⁴² *Id.* at 58:53.

⁴³ *Id.* at 55:49.

⁴⁴ *Id.* at 55:54.

⁴⁵ *Id.* at 56:50, 57:24.

Lecter says: He “hates his own identity, you see, and he thinks that makes him a transsexual, but his pathology is a thousand times more savage and more terrifying.”⁴⁶ Confounding matters further in another direction is an exchange Lecter later has with the junior Senator from Tennessee, Ruth Martin. In an airport hangar, Lecter (before praising her suit) tells Martin and the others there that Gumb, whom he misnames “Louis Friend,” came to him via another former patient, Benjamin Raspail.⁴⁷ Lecter reports: “They were lovers, you see.”⁴⁸

While the “truth” of the film is complexly braided around these complications, what has been widely carried forward in the cultural imagination about *The Silence of the Lambs* is the oversimplified approximation that Gumb actually “is” the “transsexual” he believes himself to be notwithstanding Lecter’s professional assessment. Apprehending the film as an anti-trans cultural artifact, the film negatively supplies its audience—and those in the larger cultural milieu it informs—with ready-made resources for thinking about the fate that Gumb meets in the context of the film’s anti-trans morality tale. The intrepid, rube-y, butch-y, and faintly lesbian FBI Special-Agent-in-training Starling, representing the state’s authority, but still a woman who might yet become one of Gumb’s victims, squares off against the threat Gumb poses head on. This “savage” criminal monster Jame Gumb, whose insanity partly entails him thinking he’s a “transsexual,” gets his comeuppance when Starling, gun in trembling hands as she moves through a dark house stripped of her own ordinary powers of sight, and very afraid, hears the sound of Gumb cocking a gun in order to kill her. Locating the sound, Starling spins around and stops Gumb dead, pumping Gumb’s body full of lead.⁴⁹

So understood, the moral structure of the film supplies a wholly discreditable narrative about how the body that believes itself to be trans may, even must, be treated, in order to bring this body’s predations to an end. This cultural endorsement of lethal violence fortifies still-circulating cultural logics that underwrite real—not fictive—parades of deathly horrors that anyone who has spent any time thinking seriously about the conditions of trans life cannot possibly miss: the actual, material anti-trans murders that regularly happen today and that urgently must be stopped. The lives to be remembered and the names to be spoken on the next Trans Day of Remembrance—the list of trans and gender non-conforming lives that have been cut short by fatal violence, many of whom are Black trans women—is a reminder that, in the wider cultural diffusion of legal rulings, a decision for Aimee Stephens might actually save

⁴⁶ *Id.* at 57:32.

⁴⁷ THE SILENCE OF THE LAMBS, *supra* note 40, at 1:03:25. This is an anagram for “iron sulfide also known as fool’s gold,” as Starling notes to Lecter. *Id.* at 1:07:56. Here, the name is both misleading and relates back to the notion that Gumb’s appearance is itself deceiving.

⁴⁸ *Id.* at 1:03:37.

⁴⁹ The rapid-fire suggestion of anti-trans policy arguments in Harris Funeral Homes’s merits brief rhetorically echoes differently in this light.

trans lives from being violently ended because they don't conform to traditional, biological, conventional notions of sex.⁵⁰

To be very clear here, noting these prospects is not meant in any way to suggest that Bursch, including through his depictions of the trans shower and locker room scene, which dovetails with those kind, pastoral sensibilities about the cure that suffering trans people need, has sought to make any sort of argument whatsoever that recommends lethal anti-trans violence.⁵¹ He, after all, is preaching love or toward love—not hate.⁵² Indeed, in the setting of the merits brief that includes his name, suggestions about the possibilities of psychiatric cure are carefully articulated separate and apart, hence divorced, from the brief's references to showers and locker rooms. The point being advanced here, then, recognizing all that, is that the shower and locker room scene, with its otherwise frothy anti-trans logics, is readily subject to amplification and intensification by means of just the sorts of thinking found in arguments that the merits brief filed on behalf of Harris Funeral Homes, with other briefs, makes. Those arguments work the way they do in no small part because they move in the same direction as those profoundly anti-trans cultural logics that tell nasty lies about who trans people are while spinning off recommendations about how they should be seen and treated by and under law.

Saying this is in no way to forget Harris Funeral Homes's merits brief's careful plea to give psychiatry another chance, in the setting of the case a policy argument for not treating anti-trans discrimination as sex discrimination under

⁵⁰ Reported as only a partial list and circumscribed nationally, “because too often these stories go unreported -- or misreported,” so far, in 2020, many are still mourning the following individuals: Dustin Parker, 25; Neulisa Luciano Ruiz; Yampi Méndez Arocho, 19; Monika Diamond, 34; Lexi, 33; Johanna Metzger; Serena Angelique Velázquez Ramos, 32; Layla Pelaez Sánchez, 21; Penélope Díaz Ramírez; Nina Pop; Helle Jae O'Regan, 20; Tony McDade; Dominique “Rem'mie” Fells; Riah Milton, 25; and Jayne Thompson, 33. *Violence Against the Transgender and Gender Non-Conforming Community in 2020*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020> [https://perma.cc/75AH-Q4BU] (ages listed where available). Others being mourned who have died as a result of violence in 2020 include John Scott Devore/Scottlyn Kelly Devore, 51, and Alexa Ruiz, 28. *Remembering Our Dead*, TRANSLIVESMATTER, <https://tdor.translivesmatter.info/reports?from=2020-01-01&to=2020-12-31&country=USA&view=list&filter=> [https://perma.cc/XLV3-KLAS]. And then, of course, there are those whose lives have been lost in other ways who are being grieved by family, birth and/or chosen, and by others whose lives they touched.

⁵¹ The phobically perfected form of this homicidal anti-trans violence is the total elimination of all trans people. The possibility of morality underwriting such an undertaking is documented by Stryker, *supra* note 39, at 245, noting the anti-trans commentary holding that “the problem of transsexuality would best be served by morally mandating it out of existence,” though in that setting it is not expressly linked with a call for any kind of lethal use of force.

⁵² See *supra* text accompanying note 8.

Title VII, is no sort of modest proposal.⁵³ Too immodest apparently for prime time, however, the point was dropped during Bursch's oral argument at the Supreme Court. If a florid pro-psychiatric vision of trans people drives legal normativity, it wouldn't likely exhaust itself in refuting a Title VII sex discrimination claim. Its energies drive toward eliminating trans people by what the merits brief, like McHugh's amicus brief, portrays as wholly respectable, professionally appropriate means, which would, of course, never *ever* resort to unwanted violence against trans bodies—unless perhaps absolutely necessary to get a body to take their cure. An anti-trans politics of erasure can take many forms. The orderly, professional, psychiatric elimination of trans people is but one. If successful, the elimination of trans people this way would leave no subjects with needs for anti-trans protections under antidiscrimination law.

Before moving too far away from the sharp edges of the anti-trans intensity that Bursch's arguments in the case can inspire, it is worth tactically seeking to recapture them and all that "rage" that Justice Sonia Sotomayor said is gripping the country for one additional moment.⁵⁴ To be caught up in this impassioned resistance to trans sex discrimination rights is potentially to be transported away from the idealized space in which the rule of law's reason, "reason free from passion," governs, where thought, functioning soberly, calmly, and deliberatively.⁵⁵ Anti-trans rage, which arguments like Bursch's shower and locker room scene can inspire, indeed, seem designed to inspire, can readily take someone in a space of quiet reason, thinking about how anti-trans discrimination does or doesn't fit within existing Title VII sex discrimination rules, and move them in a flash to—or toward—a state of anti-trans panic that in the court of reason ought to stay beyond the law's normative realm.

Notice how on this level, technically, the shower and locker room scene that Bursch depicts functions as, but is not itself, a conventional analytic argument. Just so, it would be foolish to overlook how the shower scene states a powerful, if tremendously problematic, cultural image-case. It is in that sense an argument

⁵³ Brief for the Petitioner at 54–55, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 16, 2019). Nor is it, in the wider scene of "medical discourse, practices and institutions" that manage trans life and manage and "undermine transgender access to body-modifying procedures," an uncomplicated one. Spade, *Mutilating Gender*, *supra* note 27, at 315. For some of the challenges and potential traps that pro-trans projects face when they seek to engage, loosen, and otherwise alter and/or overcome the strictures of "these discourses, practices, and institutions," as seen from within a critical trans perspective that has "progressive, subversive, radical, or liberatory political ideals" in its sights, see *id.* at 315, 319 (speaking to how "[a]n approach that recognizes the possibility of a norm-resistant, politicized, and feminist desire for gender-related body alteration need not reject the critique of medical practice regarding transsexuality nor embrace the normalizing regulations of the diagnostic and treatment processes").

⁵⁴ The precise language Justice Sonia Sotomayor uses here is "raging." Bostock Transcript, *supra* note 21, at 12.

⁵⁵ *LEGALLY BLONDE* 26:07 (Metro-Goldwyn-Mayer 2001). The original is ARISTOTLE, *THE POLITICS OF ARISTOTLE* 146 (Ernest Baker trans., 1946) ("Law [as the pure voice of God and reason] may thus be defined as 'Reason free from all passion.'").

that, with its specter of a phallic trans woman naked in a shower and locker room with vulnerable cis-women, delivers a complete answer to the suggestion that trans people should be given any sort of protections that would allow this kind of thing to happen. All in caps: NO!

The leap this argument makes from the facts of the case to the space that it seeks to occupy is remarkable. NO!, but never mind that Aimee Stephens worked quietly as a funeral director and an embalmer without relevant incident in the record for years.⁵⁶ NO!, but never mind that Stephens's firing, by Harris Funeral Homes's own admission, had nothing to do with her using the ladies' bathroom, much less a shower or a locker room at work.⁵⁷ NO!, but never mind that, from what appears in the record, Stephens did her job with the quiet professionalism required of this professional undertaking.⁵⁸ NO!, but never mind that she was fired simply for coming out and wanting to be herself, including wishing to dress in conformity with her gender identity, at work.⁵⁹ NO!, but never mind that Stephens, relating in her own ways to the day-to-day struggles of being trans and living within a market economy, wanted to be herself and to provide for herself and her wife.⁶⁰ The leap that Bursch's argument makes from the facts of the case to the shower and locker room scene he wants to make into the ground of and for judicial decision is nothing short of spectacular. It is an invitation—not a command—to swell into a rageful, even panicked, anti-trans state.

⁵⁶ EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 567, 572 (6th Cir. 2018) (noting job as "Funeral Director/Embalmer" and that "Rost admitted that he did not fire Stephens for any performance-related issues"), *cert. granted in part*, 139 S. Ct. 1599 (2019) (mem.).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See, e.g., Emanuella Grinberg, *She Came Out as Transgender and Got Fired. Now Her Case Might Become a Test for LGBTQ Rights Before the US Supreme Court*, CNN (Sept. 3, 2018), <https://www.cnn.com/2018/08/29/politics/harris-funeral-homes-lawsuit/index.html> [<https://perma.cc/N3Q8-5B3P>] ("Stephens' health began to decline due to kidney failure and she could no longer work. Money became tight and Donna Stephens had to take on extra jobs while she grappled with her spouse's transition. They sold their van, their camper and a piano to make ends meet."); see also, e.g., Katelyn Burns, *Aimee Stephens, Who Brought the First Major Trans Rights Case to the Supreme Court, Has Died*, Vox (May 12, 2020), <https://www.vox.com/identities/2020/5/8/21251746/aimee-stephens-trans-supreme-court-health> [<https://perma.cc/GJK5-EGCK>] ("Being fired from her employer caused an immediate financial strain, leading her spouse Donna to take on several jobs, . . . 'Friends and family have stepped in when they can, but years of lost income have taken a toll on their finances.'") (citation omitted); *id.* ("The details of the end of her life — and the financial strain from her experience with job discrimination — are common for trans people in the US. Trans people are three times more likely than their cisgender peers to be unemployed, according to the 2015 US Transgender Survey. Meanwhile, 29 percent of trans people live in poverty, and one in five trans people in the US will experience homelessness in their lifetimes.") (citations omitted).

It may take work to see the complexly full simplicity of the deeply anti-trans position that Bursch's argument mobilizes through what are, in fact, tiny gestures toward the shower and locker room scene that is central to his anti-trans case. Or not. For some, this all may be very easy to see. In any event, having once gotten far enough away from the intensity of the scene to see it in a fully critical light, the question is: What will the Supreme Court do with it when deciding the cases?

Next time: But why the shower? How has it functioned in the U.S. cultural archive, including in the context of LGBT rights, classically as an instrument to resist them? What might the shower, which is importantly connected to the closet, yet teach about what happened at the Supreme Court in the Title VII sex discrimination cases? What might it reveal about some of the most spectacular moments during oral arguments in them?

The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part V

MARC SPINDELMAN*

I. THE SHOWER'S MEMORY—THEN AND NOW¹

For a long time now, the shower has occupied a significant place in the U.S. cultural archive, and a highly fraught one in the sub-archive of the LGBT-related *Kulturkampf*.² After its seeming disappearance from prominence for a number

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¹ Earlier parts of this work appear as Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part I*, 81 OHIO ST. L.J. ONLINE 81 (2020); Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part II*, 81 OHIO ST. L.J. ONLINE 87 (2020) [hereinafter Spindelman, *The Shower's Return, Part II*]; Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part III*, 81 OHIO ST. L.J. ONLINE 101 (2020) [hereinafter Spindelman, *The Shower's Return, Part III*]; and Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part IV*, 81 OHIO ST. L.J. ONLINE 117 (2020) [hereinafter Spindelman, *The Shower's Return, Part IV*].

² An important aspect of the U.S. cultural archive and the sub-archive of LGBT-related *Kulturkampf* is how the shower scene involved in the LGBT Title VII cases traces a genealogy that moves to and through the history and cultural politics of struggles for cis-women's sex equality rights, including the national conversation over the Equal Rights Amendment, which famously featured both bathrooms and same-sex marriage among the reasons the measure did not become part of the federal Constitution on the timeline many had hoped for. These items are tracked, with some key sources on sex-segregated restrooms—not showers—in Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 146–57 (2017) (discussing the “history of the public restroom,” and noting

years, its reemergence in a central position in the LGBT Title VII sex discrimination cases can stir a complex range of collective and individual memories, including traumas associated with how the shower worked to closet and bring ruin to lesbian women's and gay men's lives, prominently, but not exclusively, the professional lives of lesbian and gay military servicemembers who were prevented from openly serving the nation as who they were and are until that military ban was fully lifted less than a decade ago.³ The re-emergence of the shower scene in the LGBT Title VII litigation, its structural elements basically still intact, testifies not merely to a certain lack of creative imagination by foes of LGBT rights arguing before the Supreme Court, but also to the profound ways the shower continues to exert a powerful hold on our nation's cultural and symbolic life in the areas of sex, gender, sexual difference, and inequality. Evidently, the shower still can set pro-LGBT and anti-LGBT mind-bodies ablaze, if in very different ways.

As a cultural reference point with a track record of meaningful, if ultimately historically limited, success, the shower scene is intensely regulatory in its operations. Translated from a fantasy depiction into a real-time governance rule, its function is to reflect and reinforce, hence yield, structurally hierarchical arrangements of power, including state power, that position certain bodies with authority over others, managing which bodies may go where and with what attendant qualities of life.⁴

how it is inflected by "considerations of race, class, moralism, and gender"). Mary Anne Case's work on bathrooms and sex discrimination is a vital passage point when thinking on the topic. See, e.g., Mary Anne Case, *Why Not Abolish Laws of Urinary Segregation*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING* 211 (Harvey Molotch & Laura Noren eds., 2010). For other, more gay-inflected aspects of this history, see GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890–1940*, at 207–25 (1994) (notes on bathhouses); *id.* at 475 (entry for "Tearoom (washroom) trade"). See also generally Lee Edelman, *Men's Room*, in *STUD: ARCHITECTURES OF MASCULINITY* 152 (Joel Sanders ed., 1996); Lee Edelman, *Tearooms and Sympathy, or, the Epistemology of the Water Closet*, in *THE LESBIAN AND GAY STUDIES READER* 553 (Henry Abelove et al. eds., 1993).

³ See generally Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010); Press Release, Office of the Press Sec'y, Statement by the President on the Repeal Don't Ask, Don't Tell (Sept. 20, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/09/20/statement-president-repeal-dont-ask-dont-tell> [<https://perma.cc/R8BS-PNBR>]. A timeline is provided by Clay Flaherty, *Don't Ask, Don't Tell Timeline*, JURIST (Sept. 20, 2011), <https://www.jurist.org/archives/timelines/dont-ask-dont-tell/> [<https://perma.cc/ZX7N-WTMR>]. "Seeming" is crucial here, given how, although many people may have missed it, the shower played its part in the Trump Administration's still ongoing ban on trans military service. See U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE REPORT AND RECOMMENDATIONS ON MILITARY SERVICE BY TRANSGENDER PERSONS 28–31 (Feb. 2018), <https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF> [<https://perma.cc/55KQ-HXJG>] (discussing "separate berthing, bathroom, and shower facilities").

⁴ For a turn-around, see *infra* text accompanying note 35.

The elemental building blocks of the shower scene, like the rules of haircare as Elle Woods once described them, are both “simple and finite.”⁵ First comes a basically heroic normative figure naked in a shower—regularly imagined not in the singular but in the plural. Then, in dramatic relief, comes the scene’s villain, illegitimately invading the space and claiming it as “his” own. If today’s protagonists are heroines, cis and impliedly straight women, in the 1990’s gays-in-the-military debates, they were our nation’s fighting finest: heterosexual men, military troops. Today’s villain, a trans woman, misgendered as in John Bursch’s commentary as a man “who identifies as a woman” but who “looks like a man,”⁶ has taken over the role once occupied by her older gay male brother, not a limp-wristed pansy who’d never graduate from basic training, but, like the lethal, low-voiced sexually insane criminal the trans woman has been phobically figured to be, a menacing homosexual male alpha dog trained to attack and to kill other men.⁷ Constructed this way by the U.S. military, this homosexual’s homosexuality was thought to make him, at least when he was naked in the shower with other men, an unpredictable social “other” who couldn’t be guaranteed to remain squarely inside the conventional lines of military discipline and order. In the showers, perhaps elsewhere, his own inner sexual monster, possessed of the assets of military training, could come out.

There’s nothing especially remarkable about the shower scene—then and now, a temporal gap that traumas associated with it may collapse—representing gay men and trans women in a homologous light. However erroneously and problematically, states of sexual and gender abjection regularly make those occupying them seem indistinguishable, as seen from certain vantage points occupied by those in dominant social groups that manifest these forms of otherness from which their own status is superordinately marked.⁸

⁵ LEGALLY BLONDE 1:27:38 (Metro-Goldwyn-Mayer 2001).

⁶ Transcript of Oral Argument at 45, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Oct. 8, 2019), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18107_4gcj.pdf [<https://perma.cc/8X32-Y5GT>] [hereinafter Harris Funeral Homes Transcript].

⁷ For the image, see Spindelman, *The Showers Return, Part IV*, *supra* note 1, at 125–27 (discussing *The Silence of the Lambs*). A normative vision of men-loving-men soldiers, including as an historical force, is in PLATO, *Symposium*, in *LYSIS • SYMPOSIUM • GORGIAS* 73, 103 (W.R.M. Lamb trans., 2001) (1925) (discussing the prospects of an army made up of same-sex “lovers and their favourites”); *id.* at n.1 (noting “there was such a ‘sacred band’ . . . at Thebes, which distinguished itself at Leuctra (371 B.C.)”).

⁸ This fungibility is undoubtedly now neoliberal in certain respects, but it also has a history in which what are now known as lesbian, gay, and trans identities, widely, if not universally understood to refer to very different and very specifically different types of people and ways of life, were located under larger overarching headings. *See, e.g.*, Henry Rubin, *The Logic of Treatment*, in *THE TRANSGENDER STUDIES READER* 482, 483 (Susan Stryker & Stephen Whittle eds., 2006) (“‘Sexual inversion’ referred to a broad range of cross-gender behavior (in which males behaved like women and vice-versa) of which homosexual desire was only a logical but indistinct aspect, while ‘homosexuality’ focused

The interchangeability of male and female heterosexual bodies in the shower scene is a puzzle of a different order. It's striking, and nearly astounding, recalling the shower scene's place in the wider setting of anti-LGBT rights discourses, which have long spotlighted the threats of homosexuality and more recently the threats of trans people to the ostensibly objective factual unavailability, the rock bottom non-negotiability, of male-female sex difference. But there it is just the same.

Practically, male-female fungibility in this setting serves to construct the terms of a still socially-dominant gendered and sexualized identity—cis-heterosexuality—as defining a state of subjectivity that's simultaneously socially innocent and besieged by forces that ideologies of cis-heterosexual superiority exist in contrast to, both (to use their old labels) “homosexuality” and “transsexualism” being constructivist terms that are part of bids to identify, regulate, and dominate these figures.⁹ As elsewhere, the paranoia of elites here reveals how precious heterosexual sexual innocence is insofar as it is manufactured through scenes like this, as an always-terrorized, embodied identity that needs constantly to be on guard, prepared to fight back with

on the narrower issue of sexual object choice. The differentiation of homosexual desire from cross-gender behavior at the turn of the century reflects a major reconceptualization of the nature of human sexuality, its relation to gender, and its role in one's social definition.”) (quoting George Chauncey, Jr., *From Sexual Inversion to Homosexuality: The Changing Medical Conception of Female “Deviance”*, in *PASSION & POWER: SEXUALITY IN HISTORY* 87, 88 (Kathy Peiss & Christina Simmons eds., 1989)).

⁹ Wittingly or not, this male-female fungibility may be a complex and highly contingent form of neoliberal fungibility. It is, after all, an argument that surfaces in the context of workers working within the economic machine and is even on the side of management (capital). That said, the logics here do seem to depend on norms that don't originate “within” market rationality, but rather “outside” it, whether in nature or as Bursch's client roughly characterized it, among “God[']s [g]iven gift[s].” *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 569 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599, 1599 (2019) (mem.) (“Rost avers that he ‘sincerely believe[s] that the Bible teaches that a person's sex is an immutable God-given gift.’”). For one cut into this, see the incisive and far-reaching reflections in SHANNON WINNUST, *WAY TOO COOL: SELLING OUT RACE AND ETHICS* 118 (2015) (“[G]ender in the mainstream culture of the United States has become a kind of playground for the neoliberal social rationality, offering up superficial spaces that are easily evacuated of any historical meanings and that are thus served up for endless self-enhancement and manipulation.”), and *id.* at 118–31 (additional related argument). For another cut, consider the study of the complex relations between neoliberal rationalist economic fungibility projects as they interface with religious and moral traditionalism as that interface is precisely and surprisingly traced in Amy J. Cohen, *Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States*, 104 MINN. L. REV. 889, 894, 903, 931–53 (2019) (tracing “distinctively moral form[s] of neoliberalism” in the context of certain “restorative justice” discourses and practices). The easy point and locus classicus for homosexuality's function as a regulatory category is MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION* 43 (Robert Hurley trans., 1978) (1976) (“The nineteenth-century homosexual became a personage, a past, a case history, and a childhood . . . the homosexual was now a species.”).

ferocious, even lethal, zeal against the sources of its own terrorization.¹⁰ Not coincidentally, the shower scene also illustrates how profoundly heterosexuality is soaked in guilty terrors of sexual violence and harm, with that guilt—no doubt chiefly relating to cis-straight men’s manifest sexual violence against women across the expanse of social life—projected outward and onto thoughts of sexual and gender “others” who would present themselves, even if only in the heterosexualized imagination, naked and in proximity to heterosexual bodies in ways that sexualize the encounters, and, in the process, wash sex difference amidst the sexual violence they figuratively entail, out.¹¹

This being the case, here’s an insight into why, in the face of imaginary prospects of gay male and trans female sexual predation, some straight cis-men and cis-women may identify themselves with one another as the potential victims of these fungible “others” whose own sexual and gender differences likewise disappear. The shower scene, constructed this way, points to the prospect that, despite initial appearances of differences between them, the trans shower scene, which is normatively prior to the gay male shower scene in the LGBT Title VII sex discrimination cases, bears uncanny resemblances in a genealogy to its historical antecedent. If this is not to figure one as the copy of the other, it does suggest they are both part of a composite photonegative in which the shower scene supplies an urgent, present-tense, but historically-grounded vision featuring a variable nonnormative queer “other” capable of materializing in different forms, and moving back and forth between them, while stalking and harming poor heterosexuals, all of whom still need relief and release from the sexual threat that queers pose if sex difference—and the social order built atop it—are to survive. Notably invisible within this negative—and undiscussed at oral arguments—are the full array of material mind-body dangers faced by trans people themselves in showers and locker rooms, which not uncommonly lead to safety-based closeting, a practice that lesbians and gay men, too, have undertaken in their own ways and for their own reasons in and across time.¹² The full array of material mind-body dangers and injuries that cis-

¹⁰ This is not in any way to overlook the material terrorization by cis-heterosexual men of cis-heterosexual women. See, e.g., Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1049–50, 1052–59 (1992) (discussing the “terrorization” of the cis-female body). The vast literature on cis-heterosexual women’s injuries at the hands of cis-heterosexual men offer volumes of irrefutable testimony on this. See generally, e.g., MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* (2010).

¹¹ Both Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983), and CATHARINE A. MACKINNON, *Desire and Power* (1983), in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 46 (1987), contain and generate important reasons for remaining deeply skeptical about the fungibility actually being that in ways that wash out all of its material sex-specificities.

¹² See, e.g., SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY* 154–55 (Dec. 2016), <https://www.transgenderreport.org/>

women confront at the hands of cis-heterosexual men are likewise not available within it.

In a sense, it is surprising that the shower scene makes any appearance in Gerald Bostock and Donald Zarda's Title VII sex discrimination cases. Neither Bostock's case, which involved an "award-winning advocate[] for child services" who maintained he was fired from his job for being gay after "he began participating in a gay recreational softball league," nor Zarda's, which involved a skydiving instructor who maintained he was fired after coming out to a young woman on the job in order "to assuage any concern" that she "might have about being strapped to a man for a tandem skydive," involved anyone showering, much less in the "wrong" shower.¹³ Nevertheless, the shower scene is introduced in arguments in their cases and plays an important role in them, if not so predominant a role as in Aimee Stephens's case. Looking ahead, the shower scene is as significant in the sexual identity cases as it is, in part, because of what it helps to teach about the dynamics of the cultural thinking that's happening around it and what that can do in turn to help illuminate the cultural dynamics at work in Stephens's case as well.

The shower scene makes one single prominent appearance in the course of the defense's oral argument against Bostock and Zarda's claims that anti-gay discrimination is sex discrimination prohibited by Title VII.¹⁴ As in Stephens's

quality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF [<https://perma.cc/9YP7-W8H8>] (noting responses of respondents who took steps to avoid discrimination including hiding gender identity at work).

¹³ Brief in Opposition at 2, *Altitude Express, Inc. v. Zarda*, No. 17-1623 (Aug. 16, 2018) [hereinafter *Zarda Brief in Opposition*]; see Transcript of Oral Argument at 25, *Bostock v. Clayton Cty.*; and *Altitude Express, Inc. v. Zarda*, Nos. 17-1618, 17-1623 (Oct. 8, 2019), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/17-1618_b97c.pdf [<https://perma.cc/9TZZ-FHMR>] [hereinafter *Bostock Transcript*] ("award-winning advocates for child services"); Brief for Petitioner at 5–6, *Bostock v. Clayton Cty.*, No. 17-1618 (June 26, 2019) (discussing background of Bostock's termination); *Zarda Brief in Opposition*, *supra*, at 2–3 (discussing background of Zarda's termination).

¹⁴ *Bostock Transcript*, *supra* note 13, at 48–49. References to it in the briefing in the case include Brief for Petitioners *Altitude Express, Inc.*, and Ray Maynard at 55, *Altitude Express, Inc. v. Zarda*, No. 17-1623 (Aug. 16, 2019) [hereinafter *Zarda Brief for Petitioners*] ("That view overthrows important, long-standing employment policies and practices. These include sex-specific policies for determining access to living facilities, sleeping quarters, restrooms, showers, and locker rooms; fitness tests for police, fire, and similar positions; and organizational dress and grooming standards."); Brief for Respondent at 8–9, *Bostock v. Clayton Cty.*, No. 17-1618 (Aug. 16, 2019) ("[S]ex discrimination [claims] cannot be analyzed identically as race discrimination claims . . . different treatment of men and women with respect to . . . privacy spaces (such as overnight facilities, locker rooms, restrooms and showers) [have been upheld], whereas no such differences based on race would be tolerated."); see also *Zarda Brief for Petitioners*, *supra*, at 11 (Zarda's view "actually forbids employers from distinguishing between the sexes or even considering sex at work[,] and "would topple sex-specific policies—such as restroom and locker-room access, fitness tests, and dress codes—and jeopardize the important interests that those policies advance."); *id.* at

case, the shower scene receives pride of place at a key moment in the defense's presentation: right at the tail end, or what was mistakenly believed to be the tail end, of the argument.¹⁵ Approximate timestamp: shortly before arguments in Stephens's case begin.

Setting the stage for the shower's appearance, the legal position that Pamela S. Karlan, of Stanford Law School, was making on behalf of Bostock and Zarda, was a stylized, but ultimately straightforward, doctrinal inquiry. Its structure importantly sutured their cases to Stephens's trans sex-discrimination case while also providing a mechanism for differentiating between and among them. The test for Title VII sex discrimination that Karlan offered included two steps.¹⁶ The first asked whether a plaintiff in any given sex discrimination case suffered discrimination because of his or her sex.¹⁷ Here, Karlan relied on the standard doctrinal machinery that the Supreme Court had constructed in earlier Title VII sex discrimination cases, dating back to *Los Angeles Department of Water and Power v. Manhart*.¹⁸ This inquiry is the familiar-in-this-setting "but-for sex" test: Would the plaintiff have suffered the discrimination that he or she experienced "but for" their sex? This inquiry, Karlan urged, should be followed by another to determine whether legally actionable sex discrimination took place. Henceforth, it would be necessary to show that a "reasonable person" in the plaintiff's situation would find themselves injured when they are discriminated against because of, or "but-for," his or her sex.¹⁹ This insists a plaintiff must not simply experience but must *suffer* sex-based discrimination.

Bracketing some important questions and challenges, the elegant simplicity of this test, such as it is, is partly found in how it enables legal decision-makers to engage in what may be described as social identity-based legal tailoring. To illustrate the operation of Karlan's argument, a gay man, as a man, is easily seen to experience sex discrimination prohibited by Title VII if he is not allowed to dress as a woman at work or to use the ladies' restroom there ("but for" being a

59 ("Most Americans—including people of faith, business owners, and anyone who uses sex-specific restrooms or locker-room facilities—will be affected by this ruling.").

¹⁵ See *infra* text accompanying note 24 ("and the last point, running out of time . . ."), which was followed by additional exchanges, including those noted *infra* text accompanying notes 25–31. The relevant pages of the transcript are Bostock Transcript, *supra* note 13, at 48–52.

¹⁶ David Cole endorsed this theory at oral argument on Aimee Stephens's behalf. See Harris Funeral Homes Transcript, *supra* note 6, at 4–6, 8–13, 15–17; see also Reply Brief for Respondent Aimee Stephens at 6, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Sept. 10, 2019) (same).

¹⁷ Bostock Transcript, *supra* note 13, at 15 ("My test says that you have treated the people differently because of sex, which is what we are asking you to hold here. When you treat a gay man who wants to date a woman differently than a man -- woman who wants to date a woman, that -- that's discrimination.").

¹⁸ City of L.A., Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).

¹⁹ Bostock Transcript, *supra* note 13, at 15 ("Then you get to what I've said, which is you have to ask whether a reasonable person under these circumstances would be injured by the imposition of the particular sex-specific world.").

man, meaning: if he were a woman, he would affirmatively have been allowed to do these things).²⁰ A reasonable gay man, however, would presumably *not* find sex discriminations like these to be injurious and so might not state a successful Title VII sex discrimination claim if required by an employer to dress as a man or to use the men's room.²¹ A similarly situated trans woman under those circumstances, by contrast, would be both like and unlike the gay male plaintiff. Like the gay man, she would be discriminated against because of sex if she were barred from dressing as a woman at work under sex-specific dress standards or from using the ladies' restroom there ("but for" the sex she was assigned at birth, male, she would be allowed to do these things). But, unlike a reasonable gay man, a reasonable trans woman would find sex discrimination like this injurious, since it would keep her from being herself and living openly as herself at work.²²

Challenging this position, Jeffrey M. Harris, for the defense, proposed that Karlan's theory was hardly the circumscribed rule Karlan made it out to be in her account. This is Harris quickly responding to a question from Justice Brett Kavanaugh before thinking and giving audible voice to his inner sense that the clock is about to expire on his argument. Time-pressured, Harris pivots to make one last, apparently important point before sitting down. Like Bursch's deployment of "the restroom scenario" soon would, Harris's invocation of what

²⁰ See *id.* at 15–17 (providing context for the point, including the observation by Karlan that "[a]n idiosyncratic preference does not void an otherwise valid dress code or bathroom rule"). Textured discussion of the point is in Reply Brief for Respondents at 19–21 *Altitude Express, Inc. v. Zarda*, No. 17-1623 (Sept. 10, 2019) [hereinafter *Zarda Reply Brief*], which includes the notation that "the issue in each case involving sex-specific policies will be whether the employer's sex-differentiated treatment has *injured* the plaintiff," and the observation that, "if a court concludes that the employer's provision of separate restrooms is 'innocuous' as to the individuals who have sued, it will find no violation of Title VII." *Id.* at 20. Along similar lines is an amicus brief, cited approvingly by *Zarda's* reply brief, *Zarda Reply Brief*, *supra*, at 20–21, which maintains that: "Providing equal but sex-segregated restrooms in the workplace would not materially reinforce invidious sex-based stereotypes nor otherwise appreciably harm the vast majority of male or female employees, many of whom would, in fact, prefer not to use restrooms together with persons of the opposite sex—and therefore it would not 'discriminate against' such employees for purposes of Subsection 703(a)(1)." Brief for Professor Samuel R. Bagenstos et al. as Amici Curiae Supporting Respondent at 24–25, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (July 3, 2019). Justice Ruth Bader Ginsburg echoed this point during oral arguments. See *infra* text accompanying note 27; see also *infra* note 21.

²¹ As Justice Ginsburg, clarifying, explains: "And the response to the bathrooms is who is the complaining plaintiff? And for most people, they would not be [the] complaining plaintiff. They would not be eligible because they're not injured by the separate bathrooms. In fact, they like it." *Bostock Transcript*, *supra* note 13, at 48. Gay men are presumably in this group.

²² *Id.* at 16–17 ("JUSTICE GORSUCH: Is it idiosyncratic for a transgender person to prefer a bathroom that's different than the -- the one of their biological sex? . . . MS. KARLAN: No.").

he dubs the “bathroom[] . . . standard[]” involves a ladies’ shower.²³ Quoting from the Court’s official transcript:

MR. HARRIS: I don’t see a difference between the two as far as -- and -- and the last point, running out of time, I think to go back to some of the questions about bathrooms and fitness standards, I want to be clear, under the Plaintiff’s simple but-for test, if you truly simply apply the Manhart [“but-for”] test or -- in the way they want to do it, I don’t see any way that single-sex bathrooms or showering facilities . . . [.]²⁴

In saying this, Harris indicates he is going to return to “some of the questions about bathrooms and fitness standards,” but the ultimate focus in these remarks, which is about to narrow further still, is on “single-sex bathrooms or showering facilities.”²⁵

Justice Ruth Bader Ginsburg stops Harris before he can continue in order to correct his presentation of Karlan’s doctrinal test.²⁶ Justice Ginsburg underscores Karlan’s point about “injury”—would a reasonable person in the plaintiff’s situation be injured by the sex discrimination being claimed?—three times in quick succession, as if to ensure Harris cannot possibly miss the point again.

JUSTICE GINSBURG: You have to have someone who’s injured. You have to have someone who’s injured. And the response to the bathrooms is who is the complaining plaintiff? And for most people, they would not be [the] complaining plaintiff. They would not be eligible because they’re not injured by the separate bathrooms. In fact, they like it.²⁷

In offering these thoughts, Justice Ginsburg completely ignores Harris’s mention of “showering facilities.”²⁸ Her remarks focus exclusively on bathrooms in their traditional sense and who wants to go in them, and then, having been refused, claims sex discrimination.

No sooner does Justice Ginsburg offer her thinking than Harris shoots back, carefully pulling discussion back to, to elaborate upon, the shower scene he has in mind, which, in passing, he refers to as being about “the women’s bathroom”²⁹:

²³ Harris Funeral Homes Transcript, *supra* note 6, at 45 (“the restroom scenario”); Bostock Transcript, *supra* note 13, at 48 (“bathroom[] . . . standard[]”). For discussion of the “women’s shower,” see *infra* text accompanying note 30.

²⁴ Bostock Transcript, *supra* note 13, at 48.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 49.

MR. HARRIS: Yes, Your Honor, although, of course, if someone, for example, is fired, imagine a factory with hazardous materials where people shower after work and to -- to clean up, and a -- a man used the women's bathroom and is fired. That person would certainly be injured. And I think, under my friend's test, they would say just change the sex and that person wouldn't have been fired.

But here's the problem: That's not a similarly situated person. The proper analysis would say that a neutral policy, such as use the showering facility that corresponds to your biological sex, the man who uses the women's shower, the -- the comparator is not a woman who uses the woman's shower. It's a woman who uses the men's shower, because otherwise you're not -- otherwise you're -- you're loading the dice or you're not looking at similarly situated people.³⁰

Formally, Harris's argument utterly fails to track Justice Ginsburg's basic point and the vital doctrinal work the reasonable person in the plaintiff's situation standard does within Karlan's argument. In this sense, and on one level, Harris's answer is a bust.³¹

On an entirely different plane, however, Harris has in fact subtly offered a deep reply to the case Karlan has made, with its two-step doctrinal test, as well as Justice Ginsburg's observations about it. Harris is saying that he is certain that if the Supreme Court provides the statutory anti-discrimination protections that Karlan is asking it to, the Court would, in effect, be providing protections to, hence legitimating and normalizing, the shower scene's sex-based harms.

What harms, exactly, does Harris have in mind in saying this? Interestingly, his account of the shower scene is ambiguous on a central element. Saying this isn't primarily about how, in his haste, Harris neglects to say there are any cis-women in the shower he's describing when the "man" he describes showing up there shows up. Rather, it's to notice that Harris has not explained, and has thus left blurred and out of focus, who the man is who shows up in that shower. What's his gender and/or sexual orientation? Harris leaves this part out.

³⁰ Bostock Transcript, *supra* note 13, at 48–49.

³¹ According to Martha Chamallas:

Karlan's definition of injury (that a reasonable person would regard defendant's action as an injury) does not have much grounding in Title VII law. Usually we think about the injury requirement in Title VII as deriving from the statutory requirement that the defendant's conduct must alter the "terms, conditions, or privileges" of employment, the so-called "adverse action" requirement. Adverse actions are concrete, usually official steps, taken by the employer, such as terminations, transfers, etc. Thus, it is not surprising that Harris would try to pivot and focus on the firing of a man who used the women's restroom. He was clumsily making the point that injury relates to the firing and not to whether the injured person reasonably felt aggrieved.

Email from Martha Chamallas, Robert J. Lynn Chair in Law, Michael E. Moritz Coll. of Law, The Ohio State Univ., to Marc Spindelman, Isadore and Ida Topper Professor of Law, Michael E. Moritz College of Law, The Ohio State Univ. (May 22, 2020, 9:37 AM) (on file with author).

Normally, the invocation of the unmarked category “man” in a setting like this, which Harris carries through the full stitch of his point, might be taken as properly filled up by thinking about “man” in his conventional, normative sense. It’s possible, of course, that Harris was warning the Court about how it could be opening the door to a cis-straight man “sneakily” entering the ladies’ shower, getting fired, then legally complaining he suffered sex discrimination bound up with the adverse employment action of his firing as his injury.³²

To understand Harris’s point this way introduces an important and novel element into the shower scene. It might be that the shower scene is actually about no one other than cis-straight men and their own normative cross-sex sexual proclivities being brought into the wrong place, making it non-normative in this sense, these men, and nobody else, being women’s real enemies in the showers where they, and nobody else, are the “foxes” who sexually want to invade these “henhouses” and who must be kept out lest women be sexually harmed.³³

Seen this way, cis-straight men—who may initially appear as victims, hence objects, in the photonegative—may be its actual subjects: the persons who this whole sordid business about the ladies’ shower is really about and has been about all along, with some straight men’s own inner desires, projected onto others, being what everyone who is fretting is, finally, fretting about.³⁴ If so, the

³² Ezra Ishmael Young, *What the Supreme Court Could Have Heard in R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens*, 11 CALIF. L. REV. ONLINE 9, 32 (2020) (Cole’s “answer conjured an image of men sneakily fighting for the right to enter women’s restrooms, the worst possible terrain”).

³³ Possibilities of cis-heterosexual male predation are suggested, *inter alia*, in RYAN T. ANDERSON, WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOVEMENT 186–90 (2018), and the Brief for Women’s Liberation Front and Family Policy Alliance as Amici Curiae Supporting Petitioner at 7, Gloucester Cty. Sch. Bd. v. G.G. *ex rel* Grimm, No. 16-273 (Jan. 10, 2017) (insisting on the argument holding “[t]hat *any* man can justify his presence in *any* women’s restroom, locker room, or shower by saying ‘I identify as a woman’ will not escape the notice of those who already harass, assault, and rape tens of thousands of women every day”) (italics in original). See also Sheila Jeffreys, *The Politics of the Toilet: A Feminist Response to the Campaign to ‘Degender’ a Woman’s Space*, 45 WOMEN’S STUD. INT’L F. 42, 48 (2014) (“women are sitting ducks for assault”). Jeffreys, ultimately rejecting the argument others have made, notes the possibility of its reversal thus: “A gender-neutral bathroom, according to this logic, would make women safer from assault by men because of the presence of men [really: transwomen].” *Id.* One version of this argument—affirmatively offered in the context of venturing a case for urinary integration—is in Case, *supra* note 2, at 221 (observing that “the potential expected presence of both sexes in an integrated restroom could also on occasion act as a deterrent, by decreasing the likelihood a perpetrator will be alone with his intended victim and increasing the chances a bystander able and willing to offer aid will be present”).

³⁴ Cf. Petition for Writ of Certiorari at 31, R.G. & G.R. Funeral Homes, Inc. v. EEOC, No. 18-107 (Oct. 8, 2019) (“Anyone—not just those with ‘medical diagnoses’—can profess a gender identity that conflicts with their sex. And as Stephens admitted during deposition, if an employer allows a male employee ‘to present as a woman,’ it must permit him to ‘go[] back to present[ing] as a man later on.’”) (alteration in original).

photonegative, on close inspection, might provide evidence that inculpates cis-heterosexual men while exonerating trans women. Understanding Harris's remarks this way brings sex difference back into the scene, and with a vengeance: "Man" and "woman" here are very different from one another, "man" (that's cis-hetero man) being "woman's" (that's cis-hetero woman's) enemy. More importantly perhaps, if this is right, Harris's argument offers up reasons for stopping cis-heterosexual men, women's natural sexual tormenters, by excluding *them* from Title VII sex discrimination protections, an argument that Harris has not otherwise sought to make. What would this mean for straight men who are actually sexually injured by other straight men—in showers or anywhere else?³⁵

Treated as grounded in a vision of cis-heterosexual male sexual predation, Harris's argument is a striking declaration against interest that releases and may even temporarily abandon its focus on the pro-gay and the pro-trans arguments Karlan offered to the Court. Thinking that cannot be the whole story, especially recognizing that Harris's argument is meant a block against those claims, it makes sense to regard Harris's description of the shower scene as involving a "man" who is a gay man going in the ladies' shower or a trans woman going in there, misrepresenting her in the misgendered, male-identified terms Bursch would later use.³⁶ Here the shower scene performs gay/trans fungibility, specifically gay male/trans female fungibility, to a fare-thee-well.³⁷

Recognizing that all of these possibilities are practically in play, it may not be necessary to adjudicate between or among them. Precisely because Harris's remarks involve these combinations—making it in a sense undecidable who this "man" in the ladies' shower in the hazardous materials facility is—they expose an important dimension of the shower's threat as cultural trope.

What that is, is found deep within an account provided by Kendall Thomas's brief and nearly perfect essay on the gays-in-the-military shower scene published as the debates on openly gay military service in the 1990s were themselves "raging the country."³⁸

³⁵ This kind of claim was in fact involved in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), where Joseph Oncale, the cis-straight male plaintiff in the case, maintained as part of his larger sexual harassment claim that he suffered an attempted rape in a shower. See Brief of National Organization on Male Sexual Victimization, Inc. et al. at 2–4, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (No. 96-568) (describing in the "statement of facts" that "[t]hat same night, Lyons and Pippen attempted to rape Oncale as he was taking a shower"). For some discussion of *Oncale* and its relation to sex equality concerns, see Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1 (2004).

³⁶ See, e.g., Harris Funeral Homes Transcript, *supra* note 6, at 45 ("You could have a male employee who identifies as a woman but doesn't dress as a woman, looks like a man . . .").

³⁷ From a nonbinaristic perspective on sex, of course, it involves male/female fungibility, as well.

³⁸ Bostock Transcript, *supra* note 13, at 12; Kendall Thomas, *Shower/Closet*, 20 ASSEMBLAGE 80 (1993).

Thomas's essay, entitled "Shower/Closet," delivers an incisive analysis of the gays-in-the-military shower scene that corrects once-conventional thinking holding that that scene's import chiefly or exclusively involved its "scopic" possibilities: the prospects that gay men would be casting sexually-aggressive masculine gazes upon straight men's naked bodies in showers in ways that—as acts or symbols of sexual domination and violation—would strip those straight male troops of their masculinity, thereby, consistent with sex-binaristic thinking, reducing these erstwhile rough, tough, lean, mean, straight, American male "killing machine[s]" into states of feminine submission, which might, the wild-eyed cultural logics suggested, lead to America's military defeat.³⁹ Think: The Rape of America. It's impossible to miss the *idea* of cis-heterosexual male/cis-heterosexual female fungibility that surfaces at just this point.

Recognizing these dynamics and how they operated within the symbolic economy of the military shower scene, "Shower/Closet" takes up the challenge of explaining how this scene vitally involved a different, if ultimately not unrelated, prospect of heterosexual men's sexual ruin. There was, after all, nothing formally new about men with same-sex desires being in military showers. Everyone in the military knew or had to know that men-desiring-men had long been in the showers lusting after those strong, muscular, wet, lathered-up, masculine bodies while thinking about the very good or very bad things they would like to do to them.⁴⁰ Understood as a scene about gay male sexual predation, of male dominance—decidedly *not* a scene involving gay men's desires for their own subordination at the hands of straight male troops playing the part of "rough trade"—the injunctions against gay men's "out" military service functioned as a way to police gay men and force them to police themselves, keeping their desires and the minor movements of their desiring bodies firmly in check, operating "very, very discreet[ly]," on pain not simply of separation from service by means of dishonorable discharges, but also possibly nothing less than violent—even lethal—reprisals by straight troops who would, singularly or in a group, manifest straight male unit cohesion to fight unto death to get their own alpha masculinity back.⁴¹ What this effectively meant—other than perhaps exposing fears of homosexual alpha dogs as both projection and sheer nonsense, they being emphatically and readily brought to heel in these ways, politically powerless on their own to stop it—was that the injunction against gay men openly serving in the military was part of the construction of a law-based military closet, which functioned to allow straight

³⁹ Thomas, *supra* note 38, at 80 ("scopic" possibilities); *id.* ("killing machines"). The proposal here is that "the scopophobia of straight male troops evidenced in recent media accounts [should be read] as the displaced expression of an epistemophobia or fear of knowledge which, by its very terms, its victims refuse to know." *Id.*

⁴⁰ *Id.* ("The ex-Navy Captain began by noting that 'we all know' that 'we've been able to live with homosexuals in our military quite well.'").

⁴¹ *Id.* ("The Colonel defended the ban because it had forced gay men and lesbians in the armed forces 'to be very, very discreet, to stay in the closet, so that no one knew that their conduct didn't become a matter of command attention or public attention.'").

male troops to enjoy their all-male, homosocial showering and even the homosocial hijinks that could take place in the showers, while being protected by a “privilege of unknowing” about the fantasies that gay men might still be actively harboring about them.⁴²

“Shower/Closet” thus proposes that the stakes of the shower scene were not simply or even primarily about gay men’s glances, stolen or otherwise, whether understood as acts or representations of other acts of sexual domination and violation. On an elemental level, the shower scene was about the social conditions of knowledge, about epistemology in this sense: what straight men knew, or got to know, or, more exactly, got to *not* know, when being in or moving through the shower as a distinctive social-architectural space.⁴³ The ban on gay men openly serving in the military ensured that straight troops could continue enjoying the luxury of not knowing about what gay men might be thinking about them. To lift the ban on gay men openly serving in the military would thus strip straight men of psychic-epistemic armor they had long enjoyed, perhaps unnoticed, forcing them to know—and to have to confront knowing—what they could previously never think or think seriously about. Gay men, legally freed to be out and themselves, might stop doing what they had been doing furtively. They and their male-body-focused sexual desires would henceforth be liberated, out in the open, including in the shower, under the protection of a legal right.

Accordingly, “Shower/Closet” reveals that the closet did not only involve its famous function of being the site for the production and maintenance of an oppressed and shamed gay male identity and same-sex desires.⁴⁴ Critically and crucially, the closet was *also* “the generative site of masculinist heterosexual identity.”⁴⁵ Holding this formative meaning for gay male identity *and* straight male identity, the elimination of the closet that gay troops were forced to occupy might be a net good and source of freedom for them, but it would also,

⁴² *Id.* at 81 (“The presence of ‘avowed’ homosexuals in the military would strip the straight troop of his ‘privilege of unknowing,’ leaving him naked to confront the disavowal of homosexual desire on which the homosocial apparatus of the military so crucially depends.”) (citation omitted). On homosocial hijinks, see *id.* (noting, with Alan Bérubé’s “history of gay men and lesbians in World War II,” “the importance of homosexualized ritual in male military culture,” including “ ‘homosexual buffoonery,’ a game in which a G.I. would play the role of ‘company queer,’” and then describing this play).

⁴³ *Id.* As Thomas put it: “[T]he ban debate is not so much a conflict over what can(not) be *seen*, as it is a controversy over what can(not) be *known*.” *Id.* at 80 (*italics in original*).

⁴⁴ *Id.* (describing “the closet [a]s the ‘defining structure of gay oppression in this century’”). On gay shame, GAY SHAME (David M. Halperin & Valerie Traub eds., 2009), is an indispensable resource. So, at the same time, are J. Halberstam, *Shame and White Gay Masculinity*, 23 SOC. TEXT 219 (2005), and Hiram Perez, *You Can Have My Brown Body and Eat It, Too!*, 23 SOC. TEXT 171 (2005).

⁴⁵ Thomas, *supra* note 38, at 80.

simultaneously, be a net evil and source of unfreedom for straight male troops.⁴⁶ The homosocial shower, up to that point “the straight male shower,” would cease being that the moment the ban on open military service by gay men ended.⁴⁷ And so, “Shower/Closet” crucially instructs that “the straight male shower” was neither an “opposing nor even abutting structure[]” in relation to the closet.⁴⁸ “The shower and the closet occupy the same psychic space.”⁴⁹ Hence the “Shower/Closet” as the title of the work.

“Shower/Closet” proceeds to describe the resulting threat to heterosexual men attendant upon lifting the ban on gay men openly serving in the military. The threat of lifting the ban on gay men’s open military service involves straight male troops being thrown into a new relation to knowledge that inevitably figured the prospects of psychic turmoil and/or distress. The essay chooses not to characterize this in the traditional registers of gay panic, but rather in the related terms of what the essay dubs a “‘wonder’ or epistemic panic.”⁵⁰ “Wonder” here carries the meaning not of awe, but of uncertainty, vulnerability, anxiety, puzzlement, confusion, even discombobulation, perhaps also nausea and disgust. “Epistemic panic” refers to the panic of knowing what one previously did not know.

Campily and wonderfully, the essay places a folksy account of “‘wonder’ or epistemic panic” in the mouth of a seaman who is quoted as talking publicly about the “fear[] that ‘if these people are allowed to come out of the closet, I’ll be serving aboard a ship and wondering who’s who and what’s what.’”⁵¹ In this form, the “‘wonder’ or epistemic panic” of the shower/closet was not, the essay warns, “likely to confine itself to questions about the masculinity of the

⁴⁶ This thinking about the closet’s meaning for male heterosexuality may help shed light on rhetorical gestures that frame legal, including constitutional, advances in the form of lesbian and gay liberation as types of closeting oppression—for others. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2642–43 (2015) (Alito, J., dissenting) (“I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public they will risk being labeled as bigots and treated as such by governments, employers, and schools.”).

⁴⁷ Thomas, *supra* note 38, at 80.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 81.

⁵¹ *Id.* (quoting Larry Rohter, *Off Base, Many Sailors Voice Anger Toward Homosexuals*, N.Y. TIMES, Jan. 31, 1993, at 20, <https://www.nytimes.com/1993/01/31/us/the-gay-troop-issue-off-base-many-sailors-voice-anger-toward-homosexuals.html> [<https://perma.cc/ZGL7-YZUQ>]). The full quotation of this “32-year-old tugboat master” in the *New York Times* reads: “A sea command now would mean I’m compromised. Privacy is almost nil when you go out to sea for six months, and if these people are allowed to come out of the closet, I’ll be serving aboard a ship and wondering who’s who and what’s what.” Larry Rohter, *Off Base, Many Sailors Voice Anger Toward Homosexuals*, N.Y. TIMES, Jan. 31, 1993, at 20, <https://www.nytimes.com/1993/01/31/us/the-gay-troop-issue-off-base-many-sailors-voice-anger-toward-homosexuals.html> [<https://perma.cc/ZGL7-YZUQ>].

homosexual Other.”⁵² It was not likely to confine itself to being about what gay men were doing. Turning inward, the “‘wonder’ or epistemic panic” raised difficult, perhaps excruciating, maybe even devastating, questions for heterosexual troops themselves about nothing less than their own heterosexuality and masculinity. As the essay explains: “Given the homoerotic dimensions of male military culture, the straight troop might well be compelled to come to terms with the fragile and fluid nature of his own sexual and gender identities.”⁵³ Eliminate the closet, which would by necessity eliminate the “the straight male shower,” and the stage was set for a shower scene with gay men in which heterosexual manhood—both as to its sexual and gender components—was at risk of coming undone.⁵⁴ Straight men could no longer be able to know with certainty about themselves or about anyone else “who’s who and what’s what.”⁵⁵ Male heterosexuality as a grounding psychic force, unraveled, undone, would leave straight male troops in a panic of wonder and not knowing.⁵⁶

Read against the backdrop of this analysis, Harris’s anxious rush during what he believed to be the final moments of his argument toward a representation of a hazardous materials factory’s ladies’ shower inhabited by a man whose “sexual and gender identit[y]” remained out of focus looks like an indication that Harris—whether he precisely intended it or not—understood that the logics of the shower scene can involve the unraveling of the ordinary sexual and gender precisions of “man.”⁵⁷

Harris’s remarks were scarcely the only sign of psychic experiences of wonder and its attendant disorientation circulating in the sexual identity cases. Earlier on, during an exchange between Justice Samuel Alito and Pamela Karlan, for instance, Justice Alito offered a wonderfully frank description of his own experiences encountering the various arguments being made by the parties to the gay sex-discrimination cases. Clarifying an “argument” he was making, Justice Alito remarked: “And your core -- the -- the parties have in their briefs, have all of these comparisons, and they will make your head spin if you -- if you try to figure them all out.”⁵⁸ This account of having studied “all of these comparisons” in the parties briefs winds up sounding like a report that echoes

⁵² Thomas, *supra* note 38, at 81.

⁵³ *Id.* Here may be a sign of the power of sexuality described by Shannon Winnubst as “[l]ocated in the Lacanian register of the real (or what we might call the drive in the Freudian schema)” as “fundamentally chaotic, turbulent, disordered, and disordering.” WINNUBST, *supra* note 9, at 139.

⁵⁴ Thomas, *supra* note 38, at 80.

⁵⁵ *Id.* at 81.

⁵⁶ *Id.* (“When the straight male troop walks into the shower room in the future, he will do so in the knowledge that he has been driven out of his own closet.”).

⁵⁷ Bostock Transcript, *supra* note 13, at 48–52. In actuality, as the transcript shows, Harris’s time went on longer than that. *Id.* The language of “sexual and gender identit[y]” comes from Thomas, *supra* note 38, at 81.

⁵⁸ Bostock Transcript, *supra* note 13, at 28–29.

that seaman's fears about what would happen were the ban on open gay military service to be lifted: doing his job, he'd be there looking around "wondering who's who and what's what."⁵⁹

Sexual and gender confusions—or gender and sexual confusions, either way—also emerged during oral arguments in some classically Freudian ways. This is U.S. Solicitor General Noel Francisco speaking shortly after Harris brought up the shower scene, until he found it necessary to stop and correct himself: "[S]ex means whether you're male or female, not whether you're gay or straight. So if you treat all gay and men -- gay men and women exactly the same regardless of their sex, you're not discriminating against them because of their sex."⁶⁰ Here Francisco's remark has him, before his self-correction, casually saying what many people, not thinking about femme women-loving-women, still sometimes think when they think of gay men and lesbians: "gay [men] and *men*."⁶¹ And this slip-o-the-tongue happened even after an earlier exchange in which Justice Sonia Sotomayor expressly warned against the erroneous confusions by which one might be led to think that, "[i]f you're too macho a woman, you're a lesbian."⁶²

The amusement that gender and sexual confusion can generate likewise received a share of intentional play in the arguments. Gender neutrality—a form of gender imprecision that can at times lead to confusion—was repeatedly performed in the courtroom in ways meant to produce laughs.⁶³ Responding to

⁵⁹ Thomas, *supra* note 38, at 81. One illuminating, generous, politically powerful, and beautiful way of recognizing why "[t]he sheer variety of trans bodies and genders" can sometimes feel excessive and even challenge one's "cognitive capacity to comprehend them" identifies this feeling of "[f]eeling overwhelmed" as an "experience of the sublime." T. Benjamin Singer, *From the Medical Gaze to Sublime Mutations: The Ethics of (Re)Viewing Non-Normative Body Images*, in THE TRANSGENDER STUDIES READER 601, 616 (Susan Stryker & Stephen Whittle eds., 2006). Singer likewise indexes "shutting down" as a "form of psychological protection against the terror of boundary collapse at the edge of limitlessness." *Id.*

⁶⁰ Bostock Transcript, *supra* note 13, at 53. Mentioning when the remarks surfaced is strictly meant as a temporal observation, not a causal claim, which is not to deny that one might be made, only to say none is being made here.

⁶¹ *Id.* (emphasis added).

⁶² *Id.* at 50. SIGMUND FREUD, JOKES AND THEIR RELATION TO THE UNCONSCIOUS (J. Strachey trans., 1960), remains the conventional starting point on parapraxes.

⁶³ For a related way of speaking to these problematics that traces what's figured as the problem of "transgender ideology" to its "roots in gender theory and in certain strains of feminist thinking about our embodiment," consider:

First-wave feminism was a campaign to liberate women from an overly restrictive concept of gender, so they could be free to fulfill their nature, but it gave way to a movement seeking to make women identical to men. From the error of inflexible stereotypes, our culture swung to the opposite error of denying any important differences between male and female. The result is a culture of androgyny and confusion.

Karlan's bet that Chief Justice John Roberts would address her opposing counsel as "Mr. Harris" when he stood to speak, the Chief Justice mischievously made a point of using a gender-neutral form of address to show that he was capable of taking Karlan's money and treating her and Harris exactly alike.⁶⁴ As Karlan stepped down and Harris stepped up to take the podium, the Chief Justice spoke thus: "CHIEF JUSTICE ROBERTS: [To Karlan] Thank you, counsel. [Then to Harris:] Counsel."⁶⁵ This sex-neutral term of address—which pressed back against who Ms. Karlan and Mr. Harris were in sex-specific terms—prompted laughter in the courtroom, for which Chief Justice Roberts graciously apologized, "Sorry."⁶⁶ And well enough. No laughing matter, sex-neutrality has been both a lifework and a lifeline that has conduced to less sex discrimination and hence more sex equality and liberty as matters of statutory and constitutional right.⁶⁷ Without missing the chance to make his own play against sex neutrality and its imprecisions—he being, after all, very different from *Ms. Karlan*—counsel Harris began his presentation with a notably over-articulated, "Mr. Chief Justice, and may it please the Court."⁶⁸ Laughter ensuing, Justice Roberts replied, "Touché," before Harris, having made his point, pressed on to the remainder of his argument, which flowed from his related understanding of Title VII's definition of "sex" being tied to sex's traditional truths.⁶⁹

ANDERSON, *supra* note 33, at 6; *see also id.* at 148 (making the same basic observation). For how sex-neutrality may precisely be an object of concern in some quarters, see Spindelman, *The Shower's Return, Part III*, *supra* note 1, at 109 n.29.

⁶⁴ Bostock Transcript, *supra* note 13, at 12, 31 ("When I got up, the Chief Justice said to me, 'Ms.' Karlan, I am willing to bet any amount of money I have that when Mr. Harris gets up, he is going to say 'Mr.' Harris.").

⁶⁵ *Id.* at 31.

⁶⁶ *Id.* A report on the moment from the courtroom is in Mark Walsh, *A "View" from the Courtroom: Pop Culture and Protocol*, SCOTUSBLOG (Oct. 8, 2019), <https://www.scotusblog.com/2019/10/a-view-from-the-courtroom-pop-culture-and-protocol/> [<https://perma.cc/A8ZG-42TR>] ("When it is time for Harris to begin his argument, the chief justice devilishly recognizes him by saying 'Counsel' instead of 'Mr. Harris.' As the courtroom erupts in laughter, Roberts says, 'Sorry.'").

⁶⁷ *See generally* Wendy Webster Williams, *Justice Ruth Bader Ginsburg's Rutgers Years: 1963–1972*, 31 WOMEN'S RTS. L. REP. 229 (2010); Wendy W. Williams, *Ruth Bader Ginsburg's Equal Protection Clause: 1970–80*, 25 COLUM. J. GENDER & L. 41 (2013). For further discussion, see Spindelman, *The Shower's Return, Part III*, *supra* note 1, at 108–09, 109 nn.28–29.

⁶⁸ Bostock Transcript, *supra* note 13, at 31 (emphasis added).

⁶⁹ *Id.* at 31. For the traditional understanding of "sex" embraced and advanced by the defense in briefing in Bostock and Zarda's cases, see Zarda Brief for Petitioners, *supra* note 14, at 11–23 (discussing "original public meaning" of "sex" in Title VII and related argument about how it should be understood to operate in relation to Zarda's Title VII sex discrimination claims); Brief for Respondent at 6, *Bostock v. Clayton Cty.*, No. 17-1618 (Aug. 16, 2019) ("The original public meaning of 'sex' in 1964 was being male or female. This public meaning remains the same today."); *id.* at 7–8 (discussing how this definition of "sex" works in the context of the sex stereotyping claim involved in the case); *id.* at 12–17

Reflecting back on these developments, how serious are these illustrations of gender and sexual confusion? How serious are these moments of the unconscious exposing itself? How serious are these jokes?

Whatever the answers, these examples, from their different locations, reflect something important that was happening closer to—if not right at—the normative heart of the gay sex-discrimination cases as they were being argued at the Supreme Court. Though lesbians and gay men, unlike trans people, are now known figures at the Supreme Court, its doctrine now generally treating lesbians and gay men and their lives as fully constitutionally, hence legally, normative, it is still the case that thinking about gay men, at least in the context of arguments that also involve trans women, raised a specter of conventional strictures and structures of gender and sexuality coming undone.

Indeed, as will become clear next time, gender imprecision—really gender confusion—about who’s who and what’s what in relation to gender and sexual identity showed up as an important argument from the Bench as a way to collapse the case for gay Title VII sex discrimination rights. Stay tuned.

(discussing definition of “sex” under Title VII, and comparing it to definition of sexual orientation); *id.* at 36–40 (discussing “sex” in the context of a Title VII sex stereotyping claim). For some perspective on the role of laughter in LGBT civil rights litigation, see KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 105–06 (2007) (commenting, after describing courtroom laughter that erupted as “disbelieving mirth” during oral arguments in *Lawrence v. Texas*—laughter that functioned as a way of dismissing an anti-gay line of thought that Justice Antonin Scalia was expressing: “[o]ne way of tracking the gay rights movement is to listen to the laughter attending it[,]” and “[w]ho is laughing, and with what emotion, has changed very much, very quickly”). Thanks to Courtney Cahill for engagement on laughter.

The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part VI

MARC SPINDELMAN*

I. THE SHOWER'S WONDER WEAPONIZED¹

If, at times, gender and sexual confusion operated deceptively lightheartedly during oral arguments in Gerald Bostock and Donald Zarda's cases, it didn't lack for prospects of being weaponized against the gay sex-discrimination positions in them. Here it is being turned to advantage as part of a challenge to the claim that anti-gay discrimination is sex discrimination prohibited by Title VII. The official transcript of oral arguments in these cases records a distinctively intense—and important—exchange between Justice Samuel Alito and Pamela Karlan.²

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¹ Earlier parts of this work appear as Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part I*, 81 OHIO ST. L.J. ONLINE 81 (2020); Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part II*, 81 OHIO ST. L.J. ONLINE 87 (2020); Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part III*, 81 OHIO ST. L.J. ONLINE 101 (2020) [hereinafter Spindelman, *The Shower's Return, Part III*]; Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part IV*, 81 OHIO ST. L.J. ONLINE 117 (2020); and Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part V*, 81 OHIO ST. L.J. ONLINE 133 (2020) [hereinafter Spindelman, *The Shower's Return, Part V*].

² See Transcript of Oral Argument at 67–71, *Bostock v. Clayton Cty.*; and *Altitude Express, Inc. v. Zarda*, Nos. 17-1618, 17-1623 (Oct. 8, 2019), <https://www.supremecourt>

At this moment, Justice Alito is conjuring the social figure of a same-sex attracted person whose biological sex as male or female is unknown. In Justice Alito's estimation, this person embodies the reasons that Karlan's argument must be rejected.³ The conceptual point Justice Alito is making by pointing to this homosexual person of unknown sex is that sexuality and sex are wholly independent concepts, and that sexual orientation discrimination cannot, therefore, be equated with sex discrimination under Title VII. In articulating this position, Justice Alito advances the suggestion that, since it's imaginable that an employer could engage in anti-homosexual discrimination without ever knowing the sex of the homosexual person he's discriminating against, because it's unclear in some hypothetical instance whether the homosexual being discriminated against is a *he* or a *she*, it cannot be said that anti-homosexual discrimination is categorically "because of sex." This idea falls apart even as Justice Alito is offering it, in view of the fact that same-sex sexual attraction, as Justice Alito is imagining it, is itself sex-based and sex-dependent—"because of sex" in that respect—even if it isn't at all certain in which of binary sex's directions, male or female, it is aimed.⁴ Ironically, given how the argument here proceeds from a space of category blurring, bisexuality—as a sexual orientation that includes both cross-sex and same-sex attractions—is nowhere in sight.⁵

Significant for present purposes is not so much how Justice Alito's argument interfaces with Title VII sex discrimination doctrine, nor, for that

.gov/oral_arguments/argument_transcripts/2019/17-1618_7k47.pdf [https://perma.cc/9TZZ-FHMR] [hereinafter Bostock Transcript].

³ See *id.* Arguments along those lines appeared earlier. *Id.* at 8–9 (statement of Chief Justice John Roberts); *id.* at 29–30 (statement of Justice Samuel Alito); *id.* at 45–47 (statements of Justice Neil Gorsuch and Jeffrey Harris); *id.* at 51–52 (statement of Justice Alito); see also *infra* note 4. It may be worth considering tracing Justice Alito's thinking on this point with his thinking in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2035 (2015) (Alito, J., concurring in the judgment) ("I would hold that an employer cannot be held liable for taking an adverse action because of an employee's religious practice unless the employer knows that the employee engages in the practice for a religious reason."). Thanks to Martha Chamallas for pointing out the connection.

⁴ This point was precisely expressed by Justice Gorsuch in the oral arguments in *Bostock* this way:

And I think the response from the other side is: But the statute has a more generous causal -- . . . formulation, a but-for causal formulation, so perhaps you're right that, at some level, sexual orientation is surely in -- in play here. But isn't sex also in play here because of the change of the first variable?

Bostock Transcript, *supra* note 2, at 45–46; see also *id.* at 60 ("[W]e've made very clear there's no search for sole cause in Title VII -- part of that is you fired the person because he was a man.") (statement of Justice Elena Kagan).

⁵ The "epistemic contract of bisexual erasure," discussed generally in Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000), and in different ways in Heron Greenesmith, *Drawing Bisexuality Back into the Picture: How Bisexuality Fits into LGBT Legal Strategy Ten Years After Bisexual Erasure*, 17 CARDOZO J.L. & GENDER 65 (2010), persists.

matter, whether it is right or wrong (though it's wrong), than how it posits a sex-binaristic but sex-uncertain homosexually inclined person as *the* figure who can be looked to in order to dispositively resolve the gay sex-discrimination cases. Here, that sex uncertainty, which actually, as will be explained, relates to an underlying gender and sexual confusion, is the centerpiece of Justice Alito's attack. This is the exchange:

JUSTICE ALITO: But what if the decision maker makes a decision based on sexual orientation but does not know the biological sex of the person involved?

MS. KARLAN: Well, there is no reported case that does that. And I –

JUSTICE ALITO: All right. . . . But what if it -- . . . [w]hat if it happened? We have had a lot of hypotheticals of things that may or may not have happened.

What if that happens? Is that discrimination on the basis of sex where the decision maker doesn't even know the person's sex?

MS. KARLAN: And -- and how do they know the person's sexual orientation?

JUSTICE ALITO: Because somebody who interviewed the candidates tells them that.

MS. KARLAN: And they are unable to tell anything about the person's sex?

JUSTICE ALITO: No.

MS. KARLAN: So this is Saturday Night Live Pat, as -- as an example, right?

JUSTICE ALITO: Well, I'm not familiar with that.

MS. KARLAN: Okay.

JUSTICE ALITO: But –

MS. KARLAN: Which is the person named Pat, and you can never tell whether Pat is a man or a woman.

I mean, theoretically that person might be out there. But here is the key –

JUSTICE ALITO: Theoretically what?

MS. KARLAN: Theoretically that person might be out there. But here is the key: The -- the cases that are brought are almost all brought by somebody who

says my employer knew who I was and fired me because I was a man or fired me because I was a woman.

Somebody who comes in and says I'm not going to tell you what my sex is, but, believe me, I was fired for my sexual orientation, that person will lose.

JUSTICE ALITO: Well, if that's the case, then I think your whole argument collapses because sexual orientation then is a different thing from sex.

MS. KARLAN: Of course it is. No one has claimed that sexual orientation is the same thing as sex. What we are saying is when somebody is fired –

JUSTICE ALITO: Well, let me amend it. Your argument is that sex -- discrimination based on sexual orientation necessarily entails discrimination based on sex.

But if it's the case that there would be no liability in the situation where the decision maker has no knowledge of sex, then that can't possibly be true.

MS. KARLAN: If there was that case, it might be the rare case in which sexual orientation discrimination is not a subset of sex.

But in the case where the person knows the sex of the person that they're firing or refusing to hire, and knows the sex of the people to whom that person is attracted, that is sex discrimination, pure and simple.⁶

Past Karlan's attempt at levity—and its painful reminder that, not so long ago, many people found Julia Sweeney's performance as "Pat" on *Saturday Night Live* very funny—was the eminently serious effort by Karlan to reach for, and to identify, a concrete social personage who, while perhaps unfamiliar from the caselaw, would nevertheless fit the bill that Justice Alito had in mind. How could Karlan know Justice Alito would not know who "Pat" was?⁷

What's striking about this exchange is that it is precisely uncertainty about where a homosexual body sits on which side of what Justice Alito takes to be the two-sided line of sex difference that packs the conceptual punch it is meant to deliver. It is exactly the inability here to say just "who's who and what's what" with someone like *Saturday Night Live* "Pat"—is this person a lesbian woman or a gay man?—that serves as the foundation for saying, along the lines

⁶ Bostock Transcript, *supra* note 2, at 67–70. Although laughter is not noted on the official transcript after Pamela Karlan's mention of *Saturday Night Live* "Pat," it can be heard in the audio of the exchange. Oral Argument at -2:31, *Bostock v. Clayton Cty.; Altitude Express, Inc. v. Zarda*, Nos. 17-1618, 17-1623 (Oct. 8, 2019), https://www.supremecourt.gov/oral_arguments/audio/2019/17-1618.

⁷ For a recentish account of Julia Sweeney's character "Pat" that includes some critique, see Dave Itzkoff, *Who Is Julia Sweeney Coming to Terms with? It's Pat*, N.Y. TIMES (Nov. 23, 2019), <https://www.nytimes.com/2019/11/21/arts/television/julia-sweeney-pat-snl.html> [https://perma.cc/62ZGCTVE].

of Justice Alito's thought, that if "Pat" were discriminated against for having a homosexual sexual orientation nobody could then say "Pat" was discriminated against because of his or her sex.⁸ Modestly, it seems safe to say not that this exchange involves a "'wonder' or epistemic panic," but that it works by leveraging a "'wonder' or epistemic" *problematic* that is being formulated as the *ratio decidendi* for the case.⁹ Sex uncertainty—gender confusion in homosexuality in this sense—disproves Karlan's case.

However straightforward Justice Alito's hypothesized thinking may initially seem, in blurring the lines between lesbians and gay men by means of a figure like *Saturday Night Live* "Pat," the Justice's remarks raise the prospect that recovery from the kind of head-spinning he reported experiencing upon encountering all the comparisons in the parties' briefs may be slow-going.¹⁰ For, in imagining in his own way, or in searching for, a "Pat"-like figure who defies easy binary sex classification, Justice Alito's line of questioning doesn't simply strategically blur the line between lesbians and gay men. The questioning frustrates that line in a more thoroughgoing sense. This is because "Pat" exactly offers no clear same-sex sexual identity reference point to build on to be able to know whether "Pat" is lesbian or gay. In saying this, though it may take a moment to recognize it, Justice Alito's provocation, plainly aimed at sharpening and shoring up the sexual orientation/sex divide (to say sexual orientation discrimination is not sex discrimination), weakened and even effectively eliminated the distinction between lesbians and gay men and between homosexual and trans identities. "Pat," after all, in today's terms is much more likely to be identified first and foremost as gender non-binary, or maybe genderfluid or genderqueer, hence as someone who might well identify and/or be identified as trans, not—certainly not necessarily—as either a lesbian woman or a gay man.¹¹ This is a reminder now of what many people couldn't quite get with back in the day: the full humanity, dignity, and equal worth and respect that someone like "Pat" is entitled to—not themselves any properly normative source of amusement. Living outside conventional sex-binaristic gender and sexual boxes and not just surviving but flourishing in one's own way is a

⁸ The language of "[w]ho's who and what's what" comes from Kendall Thomas, *Shower/Closet*, 20 ASSEMBLAGE 80, 81 (1993).

⁹ On the expression "'wonder' or epistemic panic," see *id.* For some discussion of it, see Spindelman, *The Shower's Return, Part V*, *supra* note 1, at 144–48.

¹⁰ See Spindelman, *The Shower's Return, Part V*, *supra* note 1, at 148–49 (discussing Justice Alito's "frank description of his own experiences encountering the various arguments being made by the parties to the gay sex-discrimination cases"); see also *id.* at 149 n.59 (discussing work suggesting that the experience of gender confusion in this setting can be understood to be a function of what it is to experience the sublime).

¹¹ Not to say they never would or might, recalling the "strategic" deployments of various labels. See, e.g., Dean Spade, *Mutilating Gender*, in THE TRANSGENDER STUDIES READER 315, 322 (Susan Stryker & Stephen Whittle eds., 2006) ("I recognize that the use of any word for myself—lesbian, transperson, transgender butch, boy, mister, FTM fag, butch—has always been/will always be strategic") (italics in original); see also *supra* note 7.

testament to the power and beautiful variations of humankind and how human beings can live in—and dream—the world.

Importantly, the actual dynamics of Justice Alito's maneuvering pushed Karlan (perhaps, ironically, partly because of her own invocation of *Saturday Night Live* "Pat") onto terrain that she, like David Cole, had carefully avoided treading when making their affirmative cases. Both Bostock and Zarda's cases, and Aimee Stephens's, as well, were organized around arguments that placed sex-binaristic sexual orientation and sex-binaristic trans identities at center stage. The basic, pro-LGBT litigation positions in all the LGBT Title VII sex discrimination cases effectively sidelined nonbinary, genderfluid, and genderqueer people.¹² In Justice Alito's exchange with Karlan, they returned as figures whose role was to help crystallize why the anti-gay sex-discrimination claim should fail.

Among the items importantly illustrated by the dynamics of the Justice Alito-Pamela Karlan exchange is the shared sense, and shared in Stephens's case, too, that the parties to the litigation functionally agreed that "sex" was and should fundamentally remain organized around a binaristic understanding—an understanding that, critically viewed, participates in the legal construction, legitimation, normalization, and even the naturalization, of male-female sex difference. This understanding of "sex" discrimination requires individuals—cis, straight, lesbian, gay, trans—to identify themselves in Title VII sex discrimination litigation as being male or female, hence at some point as being on one or the other side of the sex-difference divide, if they are to benefit from the safe-harbors of this law.¹³ Seen this way, the pro-LGBT claims in the Title VII sex discrimination cases are very important and socially and personally meaningful, but they are ultimately incrementalist law reform efforts that, on their own, do not without more open a radical channel calling sex-binarism as such into doubt. Not even Cole's position in Stephens's case did. Instead, it made a provisionally conservative case organized around sex discrimination being understood as discrimination involving the sex one is "assigned at birth."¹⁴ Karlan's willingness to bring up *Saturday Night Live* "Pat," and to

¹² It wasn't only on the Justices that the Supreme Court, institutionally speaking, was, and in many ways was left to be, a *TLIC* (a trans-low-information Court). The story here is complicated. Important dimensions of it are traced in Ezra Ishmael Young, *What the Supreme Court Could Have Heard in R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens*, 11 CALIF. L. REV. ONLINE 9, 11 (2020) (describing the argument "that progressive litigators and theorists also bear some blame" for "why judges ignore the text and construe sex discrimination laws not to protect transgender people").

¹³ For related thoughts, see generally Wendy Brown & Janet Halley, *Introduction*, in *LEFT LEGALISM/LEFT CRITIQUE 1* (Wendy Brown & Janet Halley eds., 2002); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997).

¹⁴ See, e.g., Transcript of Oral Argument at 22, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Oct. 8, 2019), https://www.supremecourt.gov/oral_argument/s/argument_transcripts/2019/18-107_4gcj.pdf [<https://perma.cc/8X32-Y5GT>] [hereinafter

make in part, a casual, but not meanspirited, joke of them, in other terms revealed a bid to press this non-binary figure back to the margins of the case and hold them there.

These descriptions of litigation strategy aside, if the differentiations between gay and trans identities, vital for many people including inside the LGBT communities, are taken as readily defeated in the ways that Justice Alito's remarks can be taken to suggest, then the distinction between the gay and trans shower scenes is subject to being defeated, too. If this is right, it reopens the analytic supplied by Kendall Thomas's "Shower/Closet" as a tool by which to understand a few final, but still vital, aspects of the case.

Stated overarchingly and programmatically, the trans/gay shower scene is, culturally speaking, the threat that it is because of its capacity to make people, including those accustomed and attached to traditional ways of thinking about gender and sexuality, wonder both about others—and themselves—in ways that can be or anyway feel radical, revolutionary, and crushing.

Consider in this light John Bursch's characterization of the implications that he thinks necessarily and inevitably follow from judicial recognition of trans sex-discrimination rights. He begins by telling the Supreme Court during his oral argument that: "[T]he Sixth Circuit [in Aimee Stephens's case] said that sex itself is a stereotype."¹⁵ From that point, Bursch's thinking rapidly escalates to a highly panicky pitch:

And Mr. Cole agrees with that 100 percent. Everything that he said this morning, sex itself is a stereotype. You can never treat a man who identifies as a woman differently because to do that is sex discrimination. When you do that, there is no sex discrimination standard under Title VII anymore. *It's been completely blown up.*¹⁶

In saying this, Bursch is formally referring to the "sex discrimination standard under Title VII."¹⁷ That's what he is technically saying has "been completely blown up."¹⁸ But his anchor for that standard—the meaning of "sex" under Title

Harris Funeral Homes Transcript] ("We are accepting the narrowest -- for purposes of this case, the narrowest definition of sex and -- and arguing that you can't understand what Harris Homes did here without it treating her differently because of her sex assigned at birth."); accord Young, *supra* note 12, at 11, 28–31 (noting and critiquing the litigation strategy).

¹⁵ Harris Funeral Homes Transcript, *supra* note 14, at 44.

¹⁶ *Id.* at 44–45 (emphasis added).

¹⁷ *Id.* at 44.

¹⁸ *Id.* at 45. Bursch made the same basic point earlier on in response to a question from Justice Ruth Bader Ginsburg: "All of the distinctions between men and women are gone forever." *Id.* at 38. Thinking like this has at times been placed at the feet of the sex-equality radicalism within second-wave feminism. See RYAN T. ANDERSON, WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOVEMENT 150–52 (2018) (engaging SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION (1970), as the "logical (if dystopian) conclusion" of Simone de Beauvoir's ideas in SIMONE

VII—itself traces back through the “original public meaning” of “sex” under Title VII to sex difference understood as an objective, biological, material fact.¹⁹ Bursch’s position had seemed to be that this fact is a rock, an account of sex’s fixed and inalterable nature. Here, however, it stands exposed as nothing more than an incredibly dense, foundational cultural reference point—something that can be, and is being, though it should absolutely not be being, “blown up.”²⁰ And “blown up” by pro-trans sex-discrimination arguments that function as a type of social or cultural dynamite.²¹ Follow the Sixth Circuit’s lead, he’s telling the Court, and the known world of sex-difference will be “completely” destroyed, cease to exist. What happens in that world? Who’s who and what’s what in it after that cataclysmic event?²²

The purportedly clarifying example of this dystopian situation is in a primal scene that involves the violences attendant upon sex difference’s destruction. Significantly, the very next sentence after Bursch says that the Sixth Circuit’s and Cole’s pro-trans positions have “completely blown [sex] up” picks up like this: “One other point on the restroom scenario. . . .”²³ And then he’s off to the races, talking about the shower and locker room scene.

Far less feverish, hence less irredeemably panicked, are the still-stirred-up thoughts that Justice Neil Gorsuch shared earlier during the oral arguments in Stephens’s case. An exchange with David Cole that was widely reported in press accounts of the oral arguments begins with Justice Gorsuch remarking how “drastic a change in this country” it would be for the Supreme Court to alter the rules about “bathrooms in every place of employment and dress codes in every place of employment.”²⁴ After some back-and-forth, Justice Gorsuch invites Cole to “assume for the moment” that he’s “with [Cole] on the textual evidence.

DE BEAUVOIR, *THE SECOND SEX* (1949), “about the oppressiveness of the female body,” and describing Firestone’s work’s aim as not just “eliminating . . . ‘male privilege’ but any distinction at all between the sexes,” and then quoting Firestone’s work, in part, to the effect that “the end goal of feminist revolution must be . . . not just the elimination of male *privilege* but of the sex *distinction* itself: genital differences between human beings would no longer matter culturally”) (emphasis in original). For additional discussion of the instability of “sex” as a category, see Spindelman, *The Shower’s Return, Part III*, *supra* note 1, at 115 n.53.

¹⁹ The precise language is “original public and legal meaning.” Harris Funeral Homes Transcript, *supra* note 14, at 30.

²⁰ *Id.* at 45 (“blown up”).

²¹ *Id.* (“blown up”).

²² The language of “[w]ho’s who and what’s what” here tracks language found in Thomas, *supra* note 8, at 81.

²³ *Id.* at 45.

²⁴ *Id.* at 24; see, e.g., Adam Liptak & Jeremy W. Peters, *Supreme Court Considers Whether Civil Rights Act Protects L.G.B.T. Workers*, N.Y. TIMES (Oct. 8, 2019), <https://www.nytimes.com/2019/10/08/us/politics/supreme-court-gay-transgender.html> [<https://perma.cc/QV6R-3KP7>] (noting the exchange and describing Justice Gorsuch as “worried about ‘the massive social upheaval’ that would follow from a Supreme Court ruling” that “Title VII may well bar employment discrimination based on sexual orientation and transgender status”).

It's close, okay? We're not talking about extra-textual stuff. We're -- we're talking about the text. It's close. The judge finds it very close.”²⁵ Justice Gorsuch continues:

At the end of the day, should he or she take into consideration the massive social upheaval that would be entailed in such a decision, and the possibility that -- that Congress didn't think about it --

. . . and that -- that is more effective -- more appropriate a legislative rather than a judicial function? That's it. It's a question of judicial modesty.²⁶

Almost perfectly, the answer Justice Gorsuch reaches on his own question, found in judicial role and function—“[i]t's a question of judicial modesty”—is an expression that is classically culturally coded as a question of a feminine virtue.²⁷ In this setting, “judicial modesty” is the feminine virtue that Lady Justice properly possesses.²⁸ Knowing that Justice Gorsuch is talking about himself at this moment, it is interesting that he frames the inquiry in the form of what a judge, “*he or she*,” is supposed to do looking at things the way that he does. Ostensibly a generous reference to the female Justices on the Court, it doesn't quite work. None of those Justices—even recognizing Justice Elena Kagan's aphoristic “we're all textualists now”—precisely shared his commitments to his preferred method of statutory interpretation *and* his concerns about “massive social upheaval” in the case.²⁹

Alternatively, of course, the observations may mark how easy it is for a male Justice's identifications to retrace the male-female sex binary and then move seamlessly back and forth between “he or she” in the context of this case, particularly after Cole had expressly invited Justice Gorsuch, earlier on, to imagine a rule asking “you or me to dress as a woman,” which Cole affirmed

²⁵ Harris Funeral Homes Transcript, *supra* note 14, at 26.

²⁶ *Id.* at 26–27. This wasn't the first time during the argument that Justice Gorsuch mentioned modesty. *See id.* at 25 (“Mr. Cole, the question is a matter of the judicial role and modesty in interpreting statutes that are old.”).

²⁷ For the quoted language, see *id.* at 27 (“It's a question of judicial modesty.”). For discussion that includes the answer Justice Gorsuch provides to his own question, see *id.* at 25–27.

²⁸ *Id.*; Marc Spindelman, *Obergefell's Dreams*, 77 OHIO ST. L.J. 1039, 1094 (2016) (discussing the theme in the context of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)).

²⁹ The language of “massive social upheaval” is from Harris Funeral Homes Transcript, *supra* note 14, at 26. For Justice Kagan's observation that “we're all textualists now,” see Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg&feature=emb_title (quoted language arrives at 8:29). *See, e.g.*, Margaret Talbot, *Is the Supreme Court's Fate in Elena Kagan's Hands?*, NEW YORKER (Nov. 11, 2019), <https://www.newyorker.com/magazine/2019/11/18/is-the-supreme-courts-fate-in-elena-kagans-hands> [<https://perma.cc/XA6X-GG7Z>] (“In the past few years, she has repeatedly declared an intellectual allegiance to textualism when it comes to interpreting statutes. ‘We are all textualists now,’ she said in 2015, at Harvard Law School. ‘The center of gravity has moved.’”).

both of them “would consider . . . a significant harm.”³⁰ Still, the feminine identification of the proper modesty a judge is supposed to show when interpreting a federal statute is readily returned to the feminine virtues threatened in the shower scene. The problem with trans sex-discrimination rights, on this level, is that they threaten feminine “modesty” and virtue that ought to be preserved. If so, it looks like Bursch’s argument may have reached home at this moment.

Against that prospect is the considerable distance between Justice Gorsuch’s talk of “massive social upheaval” and Bursch’s impassioned rhetoric of “completely blow[ing sex] up.”³¹ All the important action here seems likely to involve how Justice Gorsuch struggles in a wrestle that moves between the logics of feminine modesty associated with the Court’s institutional authority and the feminine modesty of the shower scene, which implicates Lady Justice herself, but in ways that may not easily be pinned down.³² Is Lady Justice in the shower the paragon of cis-feminine virtue who must be protected from an invading force? Or is she, in truth, with that famous sword of hers, the trans figure who must be stopped? Might she be both figures at once? A sign of the Court’s capacity to inflict injury that makes it an imaginary victim and perpetrator both? What’s a Member of the Supreme Court to do? Who can tell at this point who’s who here and what’s what?³³

Seen in terms of some of these deeper and more far-reaching resonances, Cole’s initial reply to Justice Gorsuch’s fears is only partially responsive. The “federal courts of appeals,” Cole tells Justice Gorsuch, “have been recognizing that discrimination against transgender people is sex discrimination for 20 years,” and “[t]here’s been no upheaval,” much less any “massive social upheaval.”³⁴ As an account of the social world, including the world of the American workplace governed by a developed and developing body of sex discrimination law, Cole is right: Trans sex-discrimination rights have in no way involved a “massive social upheaval.”³⁵ It is vital to get and stay very clear on that point.

But if, as seems possible, Justice Gorsuch’s concerns didn’t singularly run along the plane of logic and reason that Cole imagined, if, as seems possible, Justice Gorsuch was speaking from and toward rumblings operating on other levels—levels of cultural fantasy, of cultural myth—on which he, like others,

³⁰ Harris Funeral Homes Transcript, *supra* note 14, at 10; *see also id.* at 16 (“CHIEF JUSTICE ROBERTS: But if the claim is it discriminates because I am a transgender individual, that’s not your claim?”).

³¹ *Id.* at 26–27 (statement of Justice Gorsuch); *id.* at 45 (statement of John Bursch).

³² This is not to forget Lady Justice’s blindfold, though its implications for and in the scene may for the moment be bracketed.

³³ The language of “who’s who here and what’s what” tracks language in Thomas, *supra* note 8, at 81.

³⁴ The first quote is from Harris Funeral Homes Transcript, *supra* note 12, at 27; the second, *id.* at 26.

³⁵ *Id.*

may have felt a sense that male-female sex difference and the social ways of being it has long organized are implicated by Stephens's case and may be altered by a pro-trans decision in it in ways he couldn't fully predict—if that's where Justice Gorsuch was coming from when expressing his concerns about "massive social upheaval,"³⁶ then Cole's initial answer, savvy as it was, did not meet its mark.

Cole, seeming generally aware of this, offers a follow-up. Turning away from all the ways that trans women had been holding and would again hold the Supreme Court's attention, he showcases for the Court that "there are transgender male lawyers in this courtroom following the male dress code and going to the men's room and the . . . Court's dress code and sex-segregated restrooms have not fallen."³⁷ After this answer, Justice Gorsuch replies sharply and in a way that indicates Cole's message has not gotten all the way through, and that it does not register to Justice Gorsuch as responsive. And so Justice Gorsuch testily asks, Does Cole want to answer the question he was being asked about the "drastic" change a ruling for his client would produce—"or not?"³⁸

Much as anything else, in re-posing this question Justice Gorsuch indicates he has not resolved and released the sense of unease that he previously expressed—literally, a sense of wonder about what the case involved and what a decision for Stephens would mean for the nation and its people. Needless to say, that wonder may have been a wonder in part about how a pro-trans ruling would impact trans women, and in part about how it might be related to a pro-gay ruling in *Bostock* and *Zarda*'s cases. But perhaps only in part.

Another structural possibility that must be considered is whether and how a Justice on a trans-low-information Court might easily come away from an encounter like this one wondering not, or not only, about the effects of a pro-trans and/or a pro-gay decision on others, "out there" in the country, in terms of what the nation is ready for, but also on himself, knowing or sensing that a pro-trans ruling, particularly combined with a pro-gay ruling in the other cases, might require him, either immediately or with time, "to come to terms with the fragile and fluid nature of his own sexual and gender identities."³⁹ Happily, "fragile and fluid" is not the same as nonexistent. This is not about a dissolution into nothingness. And that—not nothingness—may prove to be just enough for a momentarily perturbed sexual and gender identity to bounce back with resilience to produce a decision grounded in conventional reasons about statutory interpretation and nothing else.

³⁶ *Id.*

³⁷ *Id.* at 27.

³⁸ *Id.* at 23–24 ("And I guess I -- I'd just like you to have a chance to respond to Judge Lynch in his thoughtful dissent in which he lamented everything you have before us, but suggested that something as drastic a change in this country as bathrooms in every place of employment and dress codes in every place of employment that are otherwise gender neutral would be change, that that - - that that's an essentially legislative decision."); *id.* at 28 ("or not") (emphasis added).

³⁹ Thomas, *supra* note 8, at 81.

Here, then, is a wonder about the kind of wonder that may have been afoot at the Supreme Court: Might it have only been Justice Gorsuch who experienced it this way in that courtroom? Going into deliberations after oral arguments, Justice Gorsuch had an active sense that the trans sex discrimination case—and to the extent he thought it tied to, or even on some level the same thing as, the gay sex discrimination cases, possibly all the Title VII sex discrimination cases—involved something portentous, maybe ineffably portentous, something far in excess of what is comfortably within the reach of a conservative Supreme Court Justice's starting-point sense of how the Court is supposed to move: tentatively, incrementally, surefootedly from “molar to molecular motions,” not in large, bold, pathmarking leaps.⁴⁰

The imaginary shower scene that, in various ways, was mobilized against pro-LGBT sex-discrimination positions in the cases is unquestionably capable of inspiring a “‘wonder’ or epistemic panic” that shakes traditional sexual and gender differences to their foundations, along the lines that Bursch and Justice Alito and Justice Gorsuch most clearly gave different kinds of expression.⁴¹ But a majority of the Supreme Court need not achieve the level of a full-on panic—or crisis—in order for a number of Justices, even pro-LGBT-inclined Justices, to feel the pull of the cultural forces that the shower's return organizes.

This could lead the Court from pro-LGBT positions, as Bursch and Jeffrey Harris hoped, or, on reflection, having processed them thoroughly at the level of reason, it could push the Court away from the forms of sex-based and discriminatory thinking the shower scene reflects, hence toward pro-LGBT outcomes in the cases. Quite apart from the Supreme Court's formal disposition of Gerald Bostock's, Donald Zarda's, and Aimee Stephens's Title VII sex discrimination cases, the litigation they involved at the Court confirms that the shower, itself still related to the closet, still has deep reserves of cultural resonance that may set the conditions under which LGBT persons can be themselves as who they are in the public world at work. Elite legal audiences who pride themselves on their rule-of-law commitments to logic and reason are not entirely immune to the gravitational pull of the shower/closet as a cultural symbol that can anchor traditionally sex-binaristic ways of living and being-in-the-world.

What's more, as the struggles for LGBT rights go on, the enduring lesson of the LGBT Title VII sex discrimination cases is that old cultural forms like the shower, which may have seemed to have been dead and gone, relegated to the ash heap of history, have an uncanny way of being given new life to carry on. They are among the truly dangerous monsters that the LGBT communities and those committed to their dignity, their equality, and their rights, must confront and do battle with, as evanescent and as trickstery as they are. The full, wide future of LGBT freedom is thus through transphobic, sexist, and

⁴⁰ The quoted language comes from *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (“molar to molecular motions”).

⁴¹ Thomas, *supra* note 8, at 81.

homophobic fantasies about trans women and gay men in showers with cis-heterosexuals.⁴² Those fantasies, whatever their guises, must be confronted, not avoided. This is hard work that must be undertaken inside and outside courtrooms in ways that are big and small, and it must be pursued, when it can be, “[e]very single day, relentlessly.”⁴³ Until the cultural power of these forms to deny people the freedom they deserve—whenever that is—is no more.

⁴² The same holds for other forms of freedom—perhaps not yet socially imaginable—that might likewise be regulated by means of logics like those of the shower scene.

⁴³ The quote comes from Chase Strangio’s moving remembrance of Lorena Borjas. Situated in fuller context, the quote reads:

On March 30 at 5:22 a.m., alone in a hospital bed in Coney Island, Lorena Borjas—the mother, guardian, hero and healer of the transgender community in Jackson Heights, Queens—died of complications related to covid-19.

Borjas, 59, was a relentless advocate who seemed to work 24 hours a day. . . .

[S]he opened her home to those who had nowhere to go and hosted events. Her smile, infectious laugh and overall connective presence calmed so much collective trauma. She built countless systems of mutual aid that helped hundreds of people over the past 30 years[.]

. . . .

[Lorena] Borjas fought for others even as she struggled to update her personal documents to accurately reflect her female gender, faced deportation or couldn’t access the health care that she needed. She fought for others every day even when she too contended with the precarity of a life on the edge of so many systemic barriers to survival. Even from her hospital bed — as she created an emergency fund for members of the trans community affected by covid-19 — she continued to teach us that we have to look out for each other, which means inconveniencing ourselves to make space for others to thrive.

This current crisis has exposed the many injustices in our health-care and economic systems. Borjas died before she could build the just world she envisioned — a world that would have taken better care of her and those she loved. But she worked every day to look after her community while relentlessly demanding that governmental and nonprofit institutions step up.

Now she is gone, so we must take up that work. Every single day, relentlessly.

Chase Strangio, *Lorena Borjas*, WASH. POST (Apr. 1, 2020), <https://www.washingtonpost.com/opinions/2020/04/01/lorena-borjas-guardian-healer-trans-community-new-york/?arc404=true> [https://perma.cc/VGF9-9TPL].